No. 90-6713-CSY
Status: DECIDED
CAPITAL CASE

Title: Reginald Jells, Petitioner
v.
Ohio

Docketed:
December 28, 1990

Court: Supreme Court of Ohio

Counsel for petitioner: Bour-Stokes,Joann

Counsel for respondent: Celebrezze Jr.,Anthony J.,
Marino,Carmen M.

Entry	Date	Note	Proceedings and Orders
1	Dec 28 1990	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 18 1991		Brief of respondent Ohio in opposition filed.
4	Jan 24 1991		DISTRIBUTED. February 15, 1991
6	Feb 19 1991		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall. (Detached opinion.)

****

No. 90-6718

In The

Supreme Court of The United States

October Term. 1990

REGINALD JELLS,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I. Whether The Sixth Amendment Requires A Trial Court To Conduct A Colloquy With A Defendant Who Indicates He Wishes To Waive His Trial By Jury In Order To Determine If That Waiver Is Knowingly, Intelligently, And Voluntarily Made?

II. Whether, In Light Of The Fact That The "Totality Of The Circumstances" Test Adopted In Manson v. Braithwaite Has Failed To Deter Police Misconduct In Conducting Lineup And Photo Arrays, This Court Should Re-Examine That Standard As It Relates To Both In-Court Identifications As Well As Testimony Of Pretrial Identifications?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. _____

In The

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REGINALD JELLS,

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-vs-

STATE OF OHIO,

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner, Reginald Jells, prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above-entitled proceeding on August 8, 1990.

OPINION BELOW

The opinion of the Supreme Court is reported as State v. Jells, 53 Ohio St. 3d 22 (1990). (Appendix A-6 - A-20.) The opinions of the Court of Appeals, Eighth Appellate District and Court of Common Pleas, Cuyahoga County, are unreported and reprinted in the appendix starting at A-22.

JURISDICTIONAL STATEMENT

The Petitioner's conviction and death sentence was affirmed by the Court of Appeals, Eighth Appellate District. Petitioner appealed as a matter of right to the Supreme Court of Ohio. (Ohio Constitution, Article IV, Section (2)(B)(2)(a)(ii).) The Supreme Court of Ohio affirmed the decision of the

Court of Appeals on August 8, 1990. Petitioner filed a Motion for Rehearing on August 20, 1990. The Motion for Rehearing was denied by the Ohio Supreme Court October 3, 1990. (Appendix A-1.)

The jurisdiction of this Court to review the judgment of the Ohio Supreme Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Amendments to the United States Constitution:

A) The Fifth Amendment, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

B) The Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

C) The Fourteenth Amendment, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Ohio statutes or rules that are implicated are reprinted in the appendix.

STATEMENT OF THE CASE

At approximately 10:30 p.m. on April 18, 1987, a man abducted Ruby Stapelton and her four year old son, Devon. Several bystanders witnessed the abduction. The witnesses testified that a scuffle ensued between the man and Ruby Stapelton. Tr. 129. The man then grabbed the woman and placed her in the front seat of a green van. Tr. 120. Devon Stapelton was also placed inside the van by the same man.

According to Devon Stapelton's testimony, the three of them drove around in the van, with his mother and the man engaging in a conversation. Tr. 184, 185. Devon then provided that the man hit his mother, and she was knocked out. Tr. 116, 87. At some point in time, the assailant stopped the van, and carried Ruby Stapelton into a junk yard. Tr. 121. The assailant then let Devon Stapelton out of the van, unharmed. Devon was found standing in front of the junk yard by a passing motorist. Tr. 251, 253.

The witnesses to the abduction telephoned the police, reporting the license plate number of the van. On April 26, 1987, the police arrested Reginald Jells as he entered his van. Two days later, the police found the body in a junk yard.

Reginald Jells was indicted by the Cuyahoga County Grand Jury on May 5, 1987, for the aggravated murder of Ruby Stapelton, and the kidnapping of her son, Devon. The aggravated murder count in the indictment carried two capital specifications pursuant to Ohio Rev. Code Ann. Section 2929.04(A)(7)(Page's 1987). One specification charged that the murder occurred during the commission of a kidnapping. The other specification charged that the murder

occurred during the commission of an aggravated robbery. The indictment also specified that Reginald Jells committed two counts of kidnapping pursuant to Ohio Rev. Code Ann. Section 2905.01(Page's 1987), and one count of aggravated robbery pursuant to Ohio Rev. Code Ann. Section 2911.01(Page's 1987).

Mr. Jells pleaded not guilty at his arraignment on May 8, 1987.

Prior to trial, the police conducted a line-up at which Edward Wright, a witness to the scuffle was present. Tr. 395. The police also composed a photographic array to show Devon Stapelton, and Owen Banks, another witness to the scuffle. Tr. 401-02. All of the witnesses selected Reginald Jells as the assailant. The witnesses repeated their identifications at trial. On July 20, 1987, Mr. Jells waived his right to a jury trial and chose to be tried to a three judge panel. Trial commenced on August 24, 1987.

During trial, the trial court dismissed the substantive count of aggravated robbery. The Court also dismissed the aggravated robbery specification attached to the count of aggravated murder. On August 31, 1987, the trial court found Mr. Jells guilty of the remaining counts in the indictment.

The penalty phase of the trial began on September 17, 1987. On September 18, 1987, the trial court found that the aggravating circumstances outweighed the mitigating factors, and imposed death. The court also sentenced Mr. Jells to serve concurrent terms of five to twenty-five years for his kidnapping convictions.

PRESERVATION OF THE FEDERAL QUESTION

The first question presented to this Court was raised for the first time in the Ohio Supreme Court. (Proposition of Law No. I.) The Ohio Supreme Court did not find waiver, but instead addressed the error on its merits.

The second question presented to this Court concerning the suggestive photographic array and lineup was raised and addressed in the Ohio Court of Appeals, Eighth Appellate District (Assignments of Error Nos. II and III) and the Ohio Supreme Court (Propositions of Law V and VI).

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY CANNOT BE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED UNLESS THE TRIAL COURT CONDUCTS A COLLOQUY WITH THE DEFENDANT CONCERNING THE RIGHT HE IS WAIVING.

A capital defendant has the right to a jury trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. "[T]rial by jury is the normal, if not preferable, mode of disposing of issues of fact in criminal cases and the right must be jealously preserved." State v. Ruppert, 54 Ohio St. 2d 263, 271 (1978), cert. denied, 439 U.S. 954 (1978). It is for this very reason that a criminal defendant may not be deprived of this right without an intelligent, voluntary and knowing waiver. Ohio Crim. R. 23(A); Ohio Revised Code Ann. Section 2945.05(Page's 1987); Adams v. United States, 317 U.S. 269 (1942). "Every reasonable presumption should be made against the waiver, especially when it relates to a right or privilege deemed so valuable as to be secured by the constitution." Simmons v. State, 75 Ohio St. 346, 352 (1906).

Prior to the commencement of his capital trial, Reginald Jells executed a waiver of his right to a jury trial. (Appendix p. A-69.) The trial court conducted a hearing on July 20, 1987, in order to accept the waiver. At the hearing, the following colloquy occurred:

Reginald, is that your signature?

THE DEFENDANT: Yes, it is, sir.

THE COURT: You did this of your own free will?

THE DEFENDANT: Yes, I did.

THE COURT: Nobody forced you to do this?

THE DEFENDANT: No, sir.

THE COURT: All right.

MR. HUBBARD: I have witnessed his signature, your Honor.

THE COURT: This will be made part of the record.

Tr. 7.

This brief examination conducted by the trial court was the only such examination. It was wholly insufficient to insure that Mr. Jells, as a capital defendant, made an intelligent, voluntary and knowing waiver of his right to a jury trial.

The trial court failed to insure that Petitioner Jells' decision was made with a sufficient awareness of the relevant circumstances and likely consequences of his waiver. An examination of the brief colloquy reveals that the trial court only asked questions directed at the voluntariness of Mr. Jells' waiver. The court did not also seek to determine that the waiver was knowingly and intelligently made. Nothing appears in the record to demonstrate that Mr. Jells was aware of the "relevant circumstances and likely consequences of his waiver."

Moreover, the trial court's omission in this case is not corrected by any actions of defense counsel. Nothing in the record indicates that trial counsel explained to Mr. Jells the consequences of his waiver. Counsel only offered on the record that he had witnessed Mr. Jells' signature. Tr. 7.

The trial court cannot begin, in a capital case, to assess if the defendant has sufficient awareness to waive his right to jury trial if the trial court does not discuss the matter with the defendant. The abbreviated discussion that occurred in the present case between the trial court and Mr. Jells could not possibly have apprised the trial court of sufficient facts to allow the trial court to make this legal determination. It is particularly crucial in a capital case that the defendant be made aware of the repercussions of his waiver.

Unlike a typical criminal case, if a capital defendant chooses to waive his right to a jury trial, a panel composed of three judges will consider the case. Ohio Rev. Code Ann. Section 2929.03(Page's 1987). This panel will not only consider the issues arising in the guilt/innocence phase, but also make the determination of which penalty will be imposed. Once a capital defendant selects the three judge panel for guilt, he may not select a jury for mitigation. A capital defendant should clearly be aware of this distinction. Additionally, in Ohio, a capital defendant should be informed there exists a presumption of correctness in cases tried before a panel of judges. State v. White, 15 Ohio St. 2d 146, 151, 239 N.E.2d 65, 70 (1968). In other words, errors that would be harmful in a case tried to a jury will be deemed harmless in a case tried to the court.

The concern that a capital defendant's rights be jealously preserved through trial by jury has prompted several jurisdictions to enact statutes forbidding jury waiver in a capital case. Colorado R. Crim. P. 23; Nevada Revised Statutes 175.011; Texas Code Crim. P. Art. 1.14; Washington Revised Statutes 10.01.060. Moreover, several jurisdictions require their trial courts in all cases conduct an extended inquiry with the defendant before

accepting a jury waiver. Maryland Rule of Criminal Procedure 735; Arizona Rule of Criminal Procedure 18.1; Pennsylvania Rule of Criminal Procedure 1101. Similarly, the Sixth Circuit Court of Appeals issued the following pronouncement for the federal district courts:

> There is no constitutional requirement that a court conduct an on the record colloquy with the defendant prior to the jury trial waiver ***. However, the manifest importance of the jury trial right and the unsatisfactory nature of collateral proceedings compels this court to make the following suggestion. We implore the district courts to personally inform each defendant of the benefits and burdens of accepting a proffered waiver.

United States v. Martin, 704 F.2d 267, 274 (6th Cir. 1983). The Ohio Supreme Court, while failing to find error in Petitioner's case, did comment that it would be a "better practice for the trial judge to enumerate all the possible implications of waiver of a jury." State v. Jells, 53 Ohio St. 3d 22, 26 (1990).

This Court has also addressed the issue of insuring that waiver of constitutional rights affirmatively appears from the record. "While an accused may waive the right to counsel, whether there is a proper wavier should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear on the record." Johnson v. Zerbst, 304 U.S. 4358, 465 (1938). (Emphasis added.) While the court's statement arose in the context of waiving the right to counsel, the rationale is equally applicable to waiving the right to jury trial.

Requiring that the trial court in a capital case conduct an extended discussion with the defendant before accepting a jury waiver would also insure the heightened degree of reliability required in a capital case. This Court has consistently recognized that death is qualitatively different from a term

of life imprisonment. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

This Court should grant certiorari to address the question of the proper inquiry to be made by a trial court in order to determine if a capital defendant has made a knowing, intelligent, and voluntary waiver of his right to a trial by jury.

II.

THE "TOTALITY OF THE CIRCUMSTANCES" TEST ADOPTED IN MANSON V. BRAITHWAITE HAS FAILED TO DETER POLICE MISCONDUCT IN CONDUCTING LINEUPS AND PHOTO ARRAYS.

This Court has recognized that a "conviction which rests on a mistaken identification is a gross miscarriage of justice." Stovall v. Denno, 388 U.S. 293, 297 (1967). Any confrontation that is "unnecessarily suggestive and conducive to irreparable mistaken identification ... denie[s] due process of law." Id. at 302. In Petitioner Jells' case, his capital conviction resulted from a suggestive photographic array as well as unreliable lineup procedures.

A.

This Court has provided that suggestiveness alone will not result in a due process violation. The key question is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Neil v. Biggers, 409 U.S. 188, 199 (1972). The "totality of the circumstances" has been defined by the use of a five factor test. The factors include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of

certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Id. at 199. Manson v. Braithwaite, 432 U.S. 98 (1977). The photo array and lineup in Petitoner's case need to be examined in light of these factors.

B.

The Cleveland Police Department, in its investigation of Petitioner Jells' case, showed a photographic array to State's witnesses Owen Banks and Devon Stapelton. Tr. 401-02. The array consisted of five color photographs. Both Owen Banks and Devon Stapleton identified Mr. Jells in court as the assailant. Tr. 132, 94. Additionally, both witnesses testified that they picked Mr. Jells' picture out of a photo array. Tr. 134, 95. There was also further testimony of a police officer regarding this pretrial identifications. Tr. 411. The photographic array was suggestive and unreliable. The photo array not only tainted the in-court identification, but testimony concerning the identification from the suggestive photo array also bolstered the in-court identification.

The array in the present case was unduly suggestive because of the nature of its composition; specifically, the photograph the police chose to use of Mr. Jells. The photograph was taken of Mr. Jells while he was outdoors. State's Exhibit E. His photograph appears very dark, and his features are nearly indistinguishable. As a matter of fact, the detective showing the array to the potential witnesses admitted during her trial testimony that the photographs of Mr. Jells was the darkest. Tr. 401.

Because Mr. Jells photograph was outside, and darker, it was very distinct from the other photographs in the array. This distinction very likely led to the witnesses' selection of Mr. Jells as the person who

committed the crime. Moreover, Devon Stapelton had described the man who murdered his mother as big and black. Tr. 406. The dark contrast of color in the photograph as well as the angle used accentuated these features, making Mr. Jells appear larger in size and darker in color than the other persons pictured. Also, when the police showed the photograph array to Owen Banks, the detective asked Mr. Banks to pick out the suspect. Tr. 155. This could only have led Mr. Banks to believe that the suspect was in the array, and he should identify him.

The suggestiveness of the photographic array in the present case is a direct result of the composition of the array, and the method used to show to each witness. The resulting trial identifications in the present case were the product of that array.

In applying the Biggers "totality of the circumstances" test to the facts of this case, the court below erroneously ignored the errors committed in the identification procedures. The application of the Biggers factors to the present case indicates the unreliability of the identifications by Owen Banks and Devon Stapleton.

1. OPPORTUNITY TO VIEW THE CRIMINAL

Owen Banks testified that when he heard screaming, he stopped the car and ran across the street to a van. Tr. 142. He further testified that the only thing he witnessed was a struggle, and the assailant putting the woman in the van. Tr. 147-148. He was not able to observe the woman and the boy after they were in the van. Tr. 152.

Devon Stapelton, by contrast, was allegedly at the scene and in the van when the murder took place. However, his opportunity to view what occurred and relate those facts is called into question by his tender age. (Devon was four years old when the crime was committed.)

2. DEGREE OF ATTENTION

The testimony of Owen Banks aptly demonstrates his lack of attentiveness to the struggle and the assailant as the events occurred. Numerous times during his testimony, he admitted that his attention may have been diverted. He first admits that upon his arrival to the scene his attention was attracted to the screaming woman. Tr. 139. He also admitted that he could not say how far the child was from the van because he was focusing on the struggle. Tr. 140. He even went so far as to state that he did not notice the little boy until he was put in the van. Tr. 141.

Moreover, when defense counsel began questioning him, and his description of the assailant, he once again admitted that he was not paying attention.

> Q: How tall would you say she was?
>
> A: I'd say around -- I'll say around 5'8", 5'9" maybe.
>
> Q: The lady was 5'8", 5'9", and the man was taller than she was?
>
> A. Of course.
>
> Q: About how much taller was he?
>
> A: I wasn't paying that much attention. He was bigger than the woman. That is why I noticed him, because of the fact he was oversized for her.

Tr. 144. Mr. Owen then concludes by stating that "during all the excitement, you don't have time to measure ... I was excited because I heard the girl scream and I could sense that something was wrong." Tr. 145.

Devon Stapelton's testimony also demonstrates his lack of attention. During his direct examination, Devon testified that he saw Mr. Jells hit his mother. Tr. 86-87. However, on cross-examination, Devon reveals that he was playing with his hands and did not actually witness his mother being hit. Tr.

116-18. The discrepancy in the testimony underscores the entire problem surrounding Devon's ability to discuss the crime and what occurred.

3. THE ACCURACY OF THE PRIOR DESCRIPTION

Neither Owen Banks nor Devon Stapelton provided a detailed description of the assailant. Owen Banks described the man as tall, over six feet, well-built with dark skin. Tr. 144. This was the extent of Owen Banks' description. Similarly, the only description Devon Stapelton could give of the assailant was that he was big and black. Tr. 406.

4. LEVEL OF CERTAINTY DEMONSTRATED BY THE WITNESS AT THE CONFRONTATION

Owen Banks and Devon Stapelton picked Mr. Jells' photograph from the array with certainty. Tr. 134, 411. However, the certainty each displayed was a product of the nature and composition of the photographic array.

5. THE LENGTH OF TIME BETWEEN THE CRIME AND THE CONFRONTATION

Devon saw the photographic array nine days after the incident occurred. Tr. 403. Owen Banks saw the array approximately one week after the incident. Tr. 154.

The photographic array in the instant case was unduly suggestive. The police chose to use a photograph of Mr. Jells that made him appear conspicuously different from the other men in the array. Moreover, the manner of presentation of the array to both Devon Stapelton and Owen Banks increased its suggestiveness. Applying the factors set out in Neil v. Biggers, supra, and Manson v. Braithwaite, supra, the identifications made by Devon and Owen were also unreliable.

C.

The Cleveland Police composed a line-up that was shown to State's witness Edward Wright. The police conducted the line-up although Mr. Wright stated

that he would not be able to identify the assailant. Tr. 408. The line-up consisted of five participants of whom Mr. Jells was the youngest member. Tr. 395. Most importantly, during the line-up, the authorities dressed Mr. Jells in distinctive clothing, a jail-issue jumpsuit made of a blue paper like material; all other participants in the line-up wore street clothes. Tr. 345. Defense counsel's motion to suppress the identification testimony resulting from the line-up was overruled by the trial court. The procedure used in the line-up operated to single out and focus attention on Petitioner Jells. The line-up was unduly suggestive, and resulted in a identification of Mr. Jells by Edward Wright. Mr. Wright not only identified Mr. Jells in-court, Tr. 168, but was also allowed to testify that he had picked Mr. Jells out of a lineup. Tr. 167-168. In addition, the police testified during trial that Mr. Wright picked Petitioner Jells out of a lineup.

This Court has recognized that eye witness identification is inherently unreliable. The danger of misidentifying criminal defendants arises when police use unduly suggestive procedures to obtain witness identification prior to trial. United States v. Wade, 288 U.S. 218, 228-229 (1967). In Stovall v. Denno, 388 U.S. 293 (1967), this Court recognized that identification testimony that is the result of police procedures that are both unnecessarily suggestive and conducive to irreparably mistaken identification violate the due process clause. Id. at 301-02. The Court has reaffirmed this holding in Manson v. Braithwaite, 432 U.S. 98 (1977). In Manson, the Court held that identification evidence derived from an unnecessarily suggestive source be excluded if the totality of the circumstances indicate that it is unreliable. Manson v. Braithwaite, 432 U.S. at 114.

An identification is not unnecessarily suggestive unless the police conduct the identification procedure in such a way that the witness' attention is directed to a particular individual identified as a suspect by the police. United States, ex rel. Goodyear, v. Delaware Correctional Center, 419 F. Supp. 93 (1976). The court in York v. State, 413 So. 2d 1372 (1982), used the following standard:

> Only pretrial identifications which are suggestive, without necessity for conducting them in such manner, are proscribed. A line-up or series of photographs in which the accused, when compared with the others, is conspicuously singled out in some manner from the others, either from appearance or statements by an officer, is impermissibly suggestive.

The jail clothing worn by Mr. Jells was obviously institutional in character. The street clothing worn by his fellow line-up participants was not. The contrast in the types of clothing clearly directed Mr. Wright's attention to Mr. Jells as the suspect.

A reasonable effort to harmonize the line-up is normally all that is required for a line-up to be acceptable. United States v. Lewis, 547 F.2d 1030 (8th Cir. 1976). In the instant case, no effort was made to harmonize this line-up. The police were in possession of Mr. Jells' street clothes and Mr. Jells could have easily changed into them prior to the line-up. Tr. 344. Moreover, there was an age discrepancy among the line-up participants. Mr. Jells was twenty-two, and the other participants were twenty-three, twenty-five, thirty, and forty-three. Tr. 392, 394, 395, 397. Further attempts to harmonize the line-up would have mandated the exclusion of the forty-three and thirty year old participants of the line-up. The prejudicial effect of this procedure was so dramatic that it encouraged eye witness identification and trial testimony

from a witness who earlier stated that he would not be able to identify the assailant. Tr. 408.

Since the procedure used for the line-up in this case must be deemed suggestive, the question is whether, under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive. Manson v. Braithwaite, 432 U.S. 98, 114 (1977). The reliability of the identification is determined by balancing the Biggers factors against the corrupting effect of the suggestive identification itself. Neil v. Biggers, supra; Manson, supra. In this instance, the corrupting effect of the suggestive identification outweighs the factors set out in Manson, supra, therefore rendering the identification testimony of the witness unreliable.

1. OPPORTUNITY TO VIEW THE CRIMINAL.

Mr. Wright, the witness, testified that he saw a screaming woman beirg dragged over to a van and then thrown inside the vehicle by the assailant. He also observed the man throw a small boy into the van. Tr. 174-179. This observation took place while he was walking from a security guard shack toward the van. He testified that the walk and the incident took about a minute. Tr. 172. However, Mr. Wright also testified that, "It could have been a couple of minutes. I don't know." Tr. 182. Additionally, the witness testified that he was, at the closest, 40 to 75 feet from the van. Tr. 181. Mr. Wright also spent some of the time during the incident in the back of the van trying to get the license number. Tr. 192. Considering the short time of observation and the distance at which the observation took place, Mr. Wright did not have a good opportunity to observe the assailant.

2. DEGREE OF ATTENTION.

3. THE ACCURACY OF THE PRIOR DESCRIPTION.

Mr. Wright's degree of attention during the short time he witnessed the incident was not focused on the assailant's particular features or physical characteristics but on the general events of the incident. This is reflected in his testimony by the high degree of certainty about the particular sequence of events and the corresponding weakness in his testimony about the specific characteristics of the assailant. Tr. 178, 408. Indeed, the officer who interviewed Mr. Wright stated that his description of the assailant was vague. Tr. 408. Mr. Wright also told the officer he would not know the assailant again if he saw him. Tr. 408.

4. LEVEL OF CERTAINTY DEMONSTRATED BY THE WITNESS AT THE CONFRONTATION.

5. THE LENGTH OF TIME BETWEEN THE CRIME AND THE CONFRONTATION.

The incident occurred on April 18, 1987, and the line-up was held on April 29, 1984. Mr. Wright, as soon as he walked into the line-up procedure, identified Mr. Jells as the assailant. Tr. 186. However, it is not surprising that such an immediate identification took place. When Mr. Wright viewed the line-up he saw five men. Of these five men only the one in the middle was wearing a jail-issued jumpsuit with a zipper down the front; the other participants were wearing street clothes. Tr. 345, 391, 395, 396, 397. Mr. Wright's attention was directed to this conspicuous clothing to Mr. Jells. Mr. Wright then selected Mr. Jells as the assailant. This selection was based on the suggestive identification procedure, not on an independent recollection of the assailant.

In the instant case, Mr. Wright' identification of Mr. Jells as the assailant was obtained through unnecessarily suggestive confrontation procedures. Under the totality of the circumstances, using the Biggers factors, the identification was unreliable. Use of the tainted identification evidence at trial violated the due process clause of the Fifth, Sixth and Fourteenth Amendments.

D.

In Manson v. Braithwaite, 432 U.S. at 112, this Court discussed deterrence as a reason supporting a per se approach to identification testimony. In rejecting the per se approach, this Court stated:

> Although the per se approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the per se one, for fear that their actions will lead to the exclusion of identifications as unreliable. (Footnote omitted.)

However, this Court's confidence in the behavior of police departments was misplaced. Police departments continue to use suggestive procedures in the identification process and courts continue to sanction their actions by allowing the admission of tainted identifications, as was illustrated in this case where the Ohio Supreme Court found the identification testimony admissible "regardless of the validity of the identification procedures." State v. Jells, 53 Ohio St. 3d at 28.

This Court should grant certiorari in this case to reexamine the adoption of per se approach to identification testimony in light of the failure of the "totality of the circumstances" approach to deter police misconduct. Alternatively, if this Court were to adhere to the "totality of the

circumstances" approach as to the admissibility of in-court identification testimony, a per se approach should be adopted for pretrial identifications. In other words, should an in-court identification be determined to be reliable, even though the procedures used in the pretrial identification are judged to be suggestive, any testimony regarding the pretrial identification should be prohibited. Admission of suggestive pretrial identification testimony serves only to bolster the in-court identification and sanction the unconstitutional conduct of the police.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

The Supreme Court of Ohio

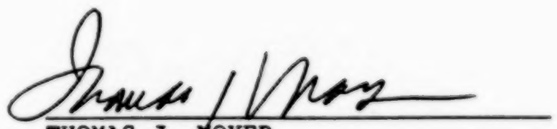
1990 TERM

To wit: October 3, 1990

State of Ohio, Appellee,	:	Case No. 89-1187
v.	:	REHEARING ENTRY
Reginald Jells, Appellant.	:	(Cuyahoga County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 54733)



THOMAS J. MOYER
Chief Justice

PROPOSITION OF LAW NO. I

THE BRIEF COLLOQUY CONDUCTED BY THE TRIAL COURT WITH APPELLANT JELLS, CONCERNING THE WAIVER OF HIS RIGHT TO TRIAL BY JURY, WAS INSUFFICIENT TO GUARANTEE THAT APPELLANT JELLS MADE AN INTELLIGENT, VOLUNTARY AND KNOWING WAIVER OF THAT RIGHT AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 5, 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. II

THE THREE JUDGE PANEL'S CITATION TO AND RELIANCE ON THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AS NONSTATUTORY AGGRAVATING CIRCUMSTANCES VIOLATED APPELLANT JELLS' RIGHTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. III

THE THREE JUDGE PANEL IN APPELLANT JELLS' CASE FAILED TO WEIGH RELEVANT MITIGATING EVIDENCE AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. IV

A FIVE YEAR OLD WITNESS UNABLE TO INDEPENDENTLY AND TRUTHFULLY RELATE FACTS, AND EXPOSED TO AN UNDULY SUGGESTIVE PHOTOGRAPHIC ARRAY, IS INCOMPETENT TO TESTIFY IN A CAPITAL TRIAL. THE TESTIMONY OF SUCH A CHILD WITNESS IN APPELLANT JELL'S CASE VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. V

THE LINE-UP SHOWN TO THE PROSECUTION WITNESS IN APPELLANT JELLS' CASE WAS UNDULY SUGGESTIVE AND INHERENTLY UNRELIABLE. THE OUT-OF-COURT IDENTIFICATION AND TRIAL TESTIMONY ARISING FROM THE ARRAY VIOLATED MR. JELLS' RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. VI

THE PHOTOGRAPHIC ARRAY SHOWN TO THE PROSECUTION WITNESSES IN APPELLANT JELLS' CASE WERE UNDULY SUGGESTIVE AND INHERENTLY UNRELIABLE. THE OUT-OF-COURT IDENTIFICATIONS AND TRIAL TESTIMONY ARISING FROM THE ARRAY VIOLATED MR. JELLS' RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. VII

EXPERT OPINION TESTIMONY IS NOT PROPERLY QUALIFIED AND NOT BASED ON REASONABLE SCIENTIFIC CERTAINTY, DENIES A CAPITAL DEFENDANT THE DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. VIII

APPELLANT JELLS' CONVICTION FOR AGGRAVATED MURDER AND KIDNAPPING VIOLATED R.C. 2941.25 AND DENIED MR. JELLS HIS RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. IX

INFLAMMATORY AND GRUESOME PHOTOGRAPHS OF THE VICTIM WERE ADMITTED DURING THE GUILT PHASE OF APPELLANT JELLS' TRIAL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. X

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION AND R.C. 2929.05 REQUIRE THE TRIAL COURT IN A CAPITAL CASE MAINTAIN A COMPLETE RECORD OF ALL PROCEEDINGS. ALLOWING UNRECORDED SIDEBARS DURING THE COURSE OF A CAPITAL TRIAL VIOLATES THESE GUARANTEES.

PROPOSITION OF LAW NO. XI

OHIO'S MANDATORY CAPITAL SENTENCING SCHEME PREVENTED THE THREE JUDGE PANEL FROM DECIDING WHETHER DEATH WAS THE APPROPRIATE PUNISHMENT IN VIOLATION OF APPELLANT JELLS' RIGHTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. XII

IT IS ERROR FOR THE TRIAL COURT TO IMPOSE A DEATH SENTENCE ON APPELLANT JELLS BASED ON HIS COMMISSION OF A FELONY MURDER WHEN THE AGGRAVATING CIRCUMSTANCE MERELY DUPLICATED AN ELEMENT OF FELONY MURDER. THE DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 2, 9, AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. XIII

THE "PROPORTIONALITY REVIEW" REQUIRED BY R.C. 2929.05 MUST MEET THE REQUIREMENTS OF DUE PROCESS AS MANDATED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION. THE PRESENT METHOD OF PROPORTIONALITY REVIEW CONDUCTED BY THIS COURT DOES NOT MEET THOSE REQUIREMENTS.

PROPOSITION OF LAW NO. XIV

THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 2, 9, 10 AND 16, ARTICLE I, ESTABLISH THE REQUIREMENTS FOR A VALID DEATH PENALTY SCHEME. OHIO'S STATUTORY PROVISIONS GOVERNING THE IMPOSITION OF THE DEATH PENALTY, CONTAINED IN 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 AND 2929.05 DO NOT MEET THE PRESCRIBED REQUIREMENTS AND, THUS, ARE UNCONSTITUTIONAL, BOTH ON THEIR FACE AND AS APPLIED TO APPELLANT JELLS.

PROPOSITION OF LAW NO. VI

THE PHOTOGRAPHIC ARRAY SHOWN TO THE PROSECUTION WITNESSES IN APPELLANT JELLS' CASE WERE UNDULY SUGGESTIVE AND INHERENTLY UNRELIABLE. THE OUT-OF-COURT IDENTIFICATIONS AND TRIAL TESTIMONY ARISING FROM THE ARRAY VIOLATED MR. JELLS' RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

THE STATE OF OHIO, APPELLEE, *v.* JELLS, APPELLANT.

[Cite as State *v.* Jells (1990), 53 Ohio St. 3d 22.]

Criminal law—Trial court not required to interrogate defendant to determine whether he is fully apprised of the right to a jury trial—Crim. R. 23(A) and R.C. 2945.05, construed and applied—Lay witness may be permitted to express his opinion as to the similarity of footprints, when—Evid. R. 701, construed and applied.

O.Jur 3d Criminal Law § 864.

1. There is no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. (Crim. R. 23[A] and R.C. 2945.05, construed and applied.)

O.Jur 3d Evidence § 592.

2. A lay witness may be permitted to express his or her opinion as to the similarity of footprints if it can be shown that his or her conclusions are based on measurements or peculiarities in the prints that are readily recognizable and within the capabilities of a lay witness to observe. (Evid. R. 701, construed and applied.)

(No. 89-1187—Submitted April 11, 1990—Decided August 8, 1990.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 54733.

Statement of the Case

On April 18, 1987, at about 10:30 to 11:00 p.m., the victim Ruby Stapleton and her four-year-old son Devon Stapleton were kidnapped in front of several witnesses at the intersection of Lakeview and Euclid Avenues in Cleveland. Three witnesses to the kidnapping and Devon identified appellant Reginald Jells as the kidnapper. Also, the witnesses identified the victim as the woman the appellant picked up and threw into a van. Moreover, the witnesses identified the van used by the appellant during the kidnapping.

Owen Banks, a witness to the abduction, testified that while he was a passenger in a car driven by his daughter, Camila Banks, he heard a woman's screams and saw the victim and appellant "tussling." He also noted that the van used to abduct the victim and her child had a sign which read "Keep on Trucking," although the van which was linked to the appellant was found to display a sign which read "Keep on Vannin'." During the abduction, Owen jumped out of the car and told his daughter to write down the license plate number of the van because he "sensed something was wrong." Furthermore, Owen observed appellant pick up a little boy, later identified as Devon, and put him into the van.

Owen approached appellant, who told him that the victim was drunk. Owen stated that he had a good look at appellant, since Owen was at the driver's side of the van looking straight at him. At trial, Owen identified a photograph of the victim as the person who was struggling with appellant, and identified appellant as the perpetrator.

Camila Banks, another witness to the abduction, testified that she was driving her father home when she heard a woman screaming "help me." She observed the appellant as he dragged a woman, whom she later identified as the victim, to the van and "shoved her inside." Next, she saw appellant pick up a little boy (Devon) and put him inside the van. Camila testified that the woman was trying to fight off the man.

Camila recorded the license number of the van, "149 MJV." Although the license number was listed in the name of "Reginald Gills," appellant later acknowledged ownership of the van. At trial Camila identified the van from a photograph, and she identified the appellant as the kidnapper.

Edward Wright, a third witness to the abduction, testified that at about 11:00 p.m., as he was concluding his shift as a security guard at Hough Bakery, he heard a woman scream. He walked to where he heard the screaming and observed a man with his arm around the waist of the screaming woman. He then saw the man throw the woman and the child into the van. Wright gave the Cleveland police a partial license number, "Y 169 or 165." He was able to pick the appellant out of a lineup, and identify him at trial. Further, he identified Devon Stapleton and a photo of the victim.

The testimony of Devon Stapleton, the son of the victim, indicates that he and his mother had entered appellant's van and later they exited the van. It is not clear from his testimony exactly how they initially came to be in the van or how they later came to be out of the van at Lakeview and Euclid Avenues. He further testified that appellant put Devon's mother back into the van, and that while they were in the van appellant hit the victim on the right side of her face with a circular object, causing her to bleed. Devon also stated that his mother was knocked out by the blows. As a result of the attack upon his mother, the hood and sleeve of Devon's coat were wet with blood.

Devon explained that appellant took his mother to a junkyard. There appellant removed his mother's body from the van, carried her into the junkyard, and abandoned her. Then appellant drove to a gas station, purchased gas, and dropped off Devon at another junkyard. Later, Clyde Smith found Devon at this junkyard crying for his mother, so he picked him up and took him to his house and called the police.

On April 26, 1987, appellant was arrested by Cleveland police. The van was identified by the license plate number that was given to police by Camila Banks. An examination of the van revealed appellant's fingerprints. A transmission jack found in the van matched marks found on the victim's body. A tennis shoe print was found on the inside of the van's windshield. The shoe print was compared with the victim's left tennis shoe and was believed to have been made by the shoe.

On April 28, 1987, an off-duty Cleveland police officer found the victim's body partially concealed by a barrel in a junkyard at East 84th and Grand Avenue in Cleveland. The body was partially nude with the pants and panties pulled down and the blouse in disarray.

A piece of cardboard with a muddy shoe print was found near the body. The shoe print matched appellant's right shoe.

The coroner testified that the victim died as a result of multiple blunt impacts to the head, neck, trunk and extremities with multiple injuries to the brain and other internal organs. Altogether the victim suffered over ninety separate blows to her body.

A three-judge panel found appellant guilty of aggravated murder with a kidnapping specification in violation of R.C. 2929.04(A)(7), and two counts of kidnapping in violation of R.C. 2905.01. For the crime of aggravated murder the panel imposed a sentence of death. Appellant was sentenced to five to twenty-five years each on the two counts of kidnapping. The court of appeals affirmed the convictions and the sentence of death.

The cause is now before this court upon an appeal as of right.

John T. Corrigan, prosecuting attorney, and *Carmen M. Marino*, for appellee.

Randall M. Dana, public defender, *David C. Stebbins* and *Joann Bour-Stokes*, for appellant.

HOLMES, J. Appellant has raised fourteen propositions of law. Each has been thoroughly reviewed and for the reasons stated below we find them without merit, and uphold the appellant's convictions and death sentence.

I

In his first proposition of law appellant argues that his waiver of his right to trial by jury was constitutionally insufficient because the trial court did not conduct a more thorough inquiry to determine whether the waiver was intelligent, voluntary and knowing. See Crim. R. 23(A); R.C. 2945.05. We note initially that this proposition of law was not raised in the court of appeals and hence the plain error standard of review of Crim. R. 52(B) is applicable to our consideration. Plain error does not exist unless it can be said that but for the error, the outcome below would clearly have been otherwise. See *State* v. *Long* (1978), 53 Ohio St. 2d 91, 7 O.O. 3d 178, 372 N.E. 2d 804, paragraph two of the syllabus; *State* v. *Greer* (1988), 39 Ohio St. 3d 236, 252, 530 N.E. 2d 382, 401.

Under R.C. 2929.03(C)(2)(a) and R.C. 2945.06 a defendant in a death penalty prosecution may waive his

right to a trial by jury and have his case heard before a three-judge panel. R.C. 2945.05, the general statute concerning jury waivers, prescribes language that should be used in waiving a jury trial.[1] In the case at bar, the waiver form signed by the appellant conformed to the language contained in R.C. 2945.05. Specifically, the form stated:

"I, REGINALD JELLS, the defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by three judges of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by jury."

The statement was signed by appellant and two of his attorneys as witnesses.

Appellant asserts that the inquiry conducted by the court was inadequate to determine whether an intelligent, voluntary, and knowing waiver was made. Appellant points to the following colloquy:

"THE COURT: Reginald, is that your signature?

"THE DEFENDANT: Yes, it is, sir.

"THE COURT: You did this of your own free will?

"THE DEFENDANT: Yes, I did.

"THE COURT: Nobody forced you to do this?

"THE DEFENDANT: No, sir.

"THE COURT: All right.

"MR HUBBARD [defense counsel]: I have witnessed his signature, your Honor.

"THE COURT: This will be made part of the record."

Appellant cites this court's opinion in *State* v. *Ruppert* (1978), 54 Ohio St. 2d 263, 271, 8 O.O. 3d 232, 237, 375 N.E. 2d 1250, 1255, certiorari denied (1978), 439 U.S. 954, as authority for his position that the trial court in this case failed to determine whether his waiver was properly made. We find *Ruppert* not to be on point. In *Ruppert* the defendant was misinformed by the trial judge that if he waived a jury trial the three-judge panel would have to unanimously find him guilty when all that was required was a majority decision. The court held that since the defendant was misinformed his waiver was not intelligent, voluntary, and knowing. *Id.* at 272, 8 O.O. 3d at 237, 375 N.E. 2d at 1255-1256. Here, there is no allegation by the appellant that the trial court misinformed him of his rights concerning the execution of the waiver form.

There is no requirement in Ohio[2] for the trial court to interrogate a defendant in order to determine

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[1] R.C. 2945.05 provides:

"In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: 'I _____, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury.'

"Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial."

[2] Contrary state practice is summarized in *Sessums* v. *State* (Fla. App. 1981), 404 So. 2d 1074, at 1076, fn. 1.

whether he or she is fully apprised of the right to a jury trial. The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel. See *State* v. *Morris* (1982), 8 Ohio App. 3d 12, 14, 8 OBR 13, 15-16, 455 N.E. 2d 1352, 1355. While it may be better practice for the trial judge to enumerate all the possible implications of a waiver of a jury, there is no error in failing to do so. Since the executed waiver in this case complied with all of the requirements of R.C. 2945.05, and counsel was present at the signing of the waiver, we find no error.

Accordingly, we find no error, plain or otherwise, and appellant's first proposition of law is not well-taken.

II

In his fourth and sixth propositions of law, appellant contends that the photographic array shown to certain witnesses, for purposes of identification, was unduly suggestive and violated several of appellant's state and federal constitutional rights.

A

First, appellant begins by asserting that the admission of the testimony of five-year-old Devon Stapleton was improper because he was unable to independently and truthfully relate facts and he was shown an unduly suggestive photographic array.

Evid. R. 601 sets forth the standards for determining the competency of a child as follows:

"Every person is competent to be a witness except:

"(A) Those of unsound mind, and children under (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly * * *[.]"

In *State* v. *Boston* (1989), 46 Ohio St. 3d 108, 114, 545 N.E. 2d 1220, 1228, this court noted that "Evid. R. 601(A) contemplates that to be competent, a witness must be able to receive a just impression of the facts, be able to recollect those impressions, be capable of communicating those impressions to others, and must understand the obligation to be truthful."

Prior to Devon's testimony the court held a competency hearing. During the voir dire, Devon testified that he knew that it was good to tell the truth and bad to tell a lie. Devon showed his ability to relate and recall facts by testifying about the circumstances of his mother's death. During his substantive testimony, Devon again proved he was able to testify by describing the facts surrounding the abduction, including the appellant's use of a van, the object used to hit his mother, the junkyard where his mother's body was discarded, and the events that took place after he was dropped off by appellant. Both the voir dire and the substantive testimony of Devon show that he was qualified to testify; therefore, the trial court did not abuse its discretion in allowing him to do so. See, *e.g.*, *State* v. *Adams* (1980), 62 Ohio St. 2d 151, 157, 16 O.O. 3d 169, 173, 404 N.E. 2d 144, 149 ("[t]he term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.").

B

Still within his fourth proposition of law, appellant alleges error with respect to the photographic array shown to Devon, in view of his age and impressionability. The array consisted of five photographs, four of other men,

taken indoors, and one of appellant, taken outdoors. Appellant claims that the photograph of him was dark, and his features were nearly indistinguishable. Both Owen Banks and Devon Stapleton selected appellant's photograph from the array, and subsequently identified him in court.

In order to suppress identification testimony, there must be "* * * a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States* (1968), 390 U.S. 377, 384; accord *State* v. *Perryman* (1976), 49 Ohio St. 2d 14, 3 O.O. 3d 8, 358 N.E. 2d 1040, vacated on other grounds (1978), 438 U.S. 911. In *Neil* v. *Biggers* (1972), 409 U.S. 188, 199-200, the United States Supreme Court set forth the following factors to be considered in examining an identification procedure and its impact.

"* * * [W]hether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. * * *"

The focus, under the "totality of the circumstances" approach, is upon the reliability of the identification, *not* the identification procedures. *State* v. *Lott* (1990), 51 Ohio St. 3d 160, 175, 555 N.E. 2d 293, 308; *Manson* v. *Brathwaite* (1977), 432 U.S. 98, 114 ("* * * reliability is the linchpin in determining the admissibility of identification testimony * * *."); *State* v. *Moody* (1978), 55 Ohio St. 2d 64, 67, 9 O.O. 3d 71, 72, 377 N.E. 2d 1008, 1010 ("[a]lthough the identification procedure may have contained notable flaws, this factor does not, *per se*, preclude the admissibility of the subsequent in-court identification.").

In applying the criteria set forth in *Biggers* it is clear to this court that there was sufficient independent opportunity for Devon to view the appellant. Specifically, Devon and the victim had been in the appellant's van for a period of time before they fled the van at the intersection of Euclid Avenue and Lakeview. Devon saw appellant grab his mother after she fled the van, and put her back into the van. Devon himself was picked off the sidewalk and put back into the van. He witnessed the bludgeoning of the victim by the appellant. During these events, Devon had an extended period of time within which to view the appellant. Further, Devon indicated that he was able to identify the appellant because he saw appellant commit the acts he described. Although appellant claims there were some inconsistencies with Devon's testimony, we find upon review of the entire transcript that he gave a generally accurate eyewitness account. Devon's testimony was not necessarily inconsistent and certainly not indicative of an unreliable witness. See *State* v. *Moody*, *supra*, at 69; 9 O.O. 3d at 74, 377 N.E. 2d at 1011 ("[a]lthough there was some evidence of discrepancies on the part of the complainant in her identification of the appellant as her assailant, these questionable areas in complainant's description were particularly for the jury to decide."). Therefore, we find no error with the photographic array shown to Devon.

C

In his sixth proposition of law, ap-

pellant again attacks the same photographic array with respect to the identification made by Owen Banks. For the same reasons that Devon's identification is reliable, Owen Banks' identification is also reliable. Banks saw the same incident and described it virtually the same as Devon. Furthermore, he identified the appellant as the man who abducted Devon and the victim. Banks not only saw appellant struggling with the victim, but also went up to the appellant and confronted him regarding appellant's treatment of the victim. Banks even commented that, although he was shown other photographs, he recognized the appellant "right off." Thus, under the totality of the circumstances, the identifications of the appellant by Devon Stapleton and Owen Banks were reliable. Consequently, regardless of the validity of the identification procedures used by the state, the identification testimony of these witnesses at trial was properly admitted.

Accordingly, appellant's fourth and sixth propositions of law are overruled.

III

In his seventh proposition of law appellant states he was denied due process of law by the admission of expert testimony that was not based upon a reasonable scientific certainty.

A

First, appellant challenges the testimony of Cleveland police officer James Yonkers who stated that he lifted two footprints, one of the victim from the windshield of appellant's van, and one of appellant's shoe which was taken from the piece of cardboard found near the body of the victim in the junkyard. In both instances a photolith, a high-contrast transparency used as an overlay, was taken of the soles of appellant's and of the victim's shoes and compared with the shoe prints on the window of the van and the cardboard, respectively. Appellant claims that the testimony of Officer Yonkers did not rise to the level of reasonable scientific certainty nor did his testimony assist the trier of fact. Essentially, appellant argues that the testimony offered by Officer Yonkers was unqualified expert testimony. We disagree. Instead we find that the testimony was merely lay opinion testimony.

Evid. R. 701 permits opinion testimony of a lay witness if the opinion or inferences are: "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue." In *State* v. *Hairston* (1977), 60 Ohio App. 2d 220, 14 O.O. 3d 191, 396 N.E. 2d 773, a police officer was permitted to compare tennis shoe prints with the soles of the tennis shoes the defendant was wearing. The *Hairston* court stated: "As to the necessity for expert testimony, it would appear that testimony on footprints can be given by lay witnesses." *Id.* at 222, 14 O.O. 3d at 192, 396 N.E. 2d at 775. Further, the court noted, " '[i]n presenting footprint evidence, it appears that a witness is often allowed to express his opinion as to the similarity of prints, if he shows that his conclusions are based on measurements or peculiarities in the prints, although in some cases it is held that he must restrict his testimony merely to a statement of the facts. Because of the obvious means of comparing footprints a lay witness is often allowed to testify in this regard and express his opinion as to similarity.' " *Id.*, quoting Annotation (1954), 35 A.L.R. 2d 856, 861; see, also, *Richardson* v. *State* (1953), 221 Ark. 567, 254 S.W. 2d 448 (no error was committed in allowing

officers, as nonexpert witnesses, to testify to the similarity of footprints in the field from which corn was stolen to the defendant's footprints); *Hutt* v. *State* (1987), 70 Md. App. 711, 523 A. 2d 643 (expert testimony was not necessary to establish correspondence between shoe prints found at scenes of three break-ins and workboots worn by defendant when arrested and tennis shoe recovered from his residence, where photograph and cast of prints and shoes themselves were offered in evidence, and trier of fact was as capable as any witness of examining evidence and noting any similarities or dissimilarities); *People* v. *Holmes* (1976), 41 Ill. App. 3d 956, 354 N.E. 2d 611 (the arresting officers could properly testify that defendant's shoe print had the same indentation on the left heel as the shoe print found at the scene of the crime, and the lack of expertise of the witnesses only went to the weight, not admissibility, of the evidence); *State* v. *Drake* (Mo. 1957), 298 S.W. 2d 374 (no error where nonexpert testifies that shoe marks at the scene of a burglary were made by defendant's shoes, since testimony was as to personally observed facts); *State* v. *Plowden* (1983), 65 N.C. App. 408, 308 S.E. 2d 918 (nonexpert testimony about shoe prints is admissible; basis or circumstances behind nonexpert opinion on shoe print do not affect admissibility, but go to the weight of the evidence); *State* v. *Edmondson* (1984), 70 N.C. App. 426, 320 S.E. 2d 315, affirmed (1986), 316 N.C. 187, 340 S.E. 2d 110; *White* v. *State* (Fla. App. 1979), 375 So. 2d 622; *D'Antignac* v. *State* (1977), 238 Ga. 437, 233 S.E. 2d 206; *People* v. *Lomas* (1981), 92 Ill. App. 3d 957, 416 N.E. 2d 408; *State* v. *Haarala* (La. 1981), 398 So. 2d 1093; *State* v. *Walker* (Minn. 1982), 319 N.W. 2d 414; *State* v. *Cullen* (Mo. App. 1979), 591 S.W. 2d 49. Thus, a lay witness may be permitted to express his or her opinion as to the similarity of footprints if it can be shown that his or her conclusions are based on measurements or peculiarities in the prints that are readily recognizable and within the capabilities of a lay witness to observe. This means that the print pattern is sufficiently large and distinct so that no detailed measurements, subtle analysis or scientific determination is needed. In such a situation, the pattern is simply identified as being similar to that customarily made by shoes. In essence, the testimony is "more in the nature of description by example than the expression of a conclusion." See *Hairston, supra*, at 223, 14 O.O. 3d at 193, 396 N.E. 2d at 775.

In the case *sub judice* the conclusion of the police officer was based upon personal observation. Although Officer Yonkers testified that this was the first time he had examined a shoe print taken from a windshield, his past experience evidenced the fact that he routinely compared patterns of grooves of bullets which, arguably, were similar to comparing the grooves that can be left by some tennis shoe patterns. Furthermore, Officer Yonkers was not testifying as to the results of a scientific test; therefore, the standard of a reasonable scientific certainty was not applicable.

B

Next, appellant challenges the testimony offered by Rynette Reed of the Cleveland Police Department Scientific Investigation Unit who testified as to bloodstains that were found on the pants and tennis shoes of appellant. Specifically, appellant now claims that the testimony should have been excluded because Reed was unable to determine the blood type, and, as to the stain on the pants, whether it was even human blood.

Reed's testimony was admitted without objection. Thus, it must be determined if the admission of this testimony constituted plain error.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. Evid. R. 401. This court held in *State* v. *Sage* (1987), 31 Ohio St. 3d 173, 31 OBR 375, 510 N.E. 2d 343, that the admission of relevant evidence rests within the sound discretion of the trial court. And the three-judge panel in this case, presumably, considered only relevant evidence. See *State* v. *Moreland* (1990), 50 Ohio St. 3d 58, 63, 552 N.E. 2d 894, 900; *State* v. *White* (1968), 15 Ohio St. 2d 146, 151, 44 O.O. 2d 132, 136, 239 N.E. 2d 65, 70.

In reviewing Reed's testimony we conclude that the evidence presented was relevant to the case; therefore, no plain error occurred below. Alternatively, since this issue was not raised in the court of appeals it is considered waived for purposes of this appeal. See *State* v. *Broom* (1988), 40 Ohio St. 3d 277, 288-289, 533 N.E. 2d 682, 695-696.

Accordingly, appellant's seventh proposition of law is overruled.

IV

Appellant in his fifth proposition of law alleges that the lineup shown to witness Edward Wright was unduly suggestive and inherently unreliable. Appellant bases this proposition on the fact that, while the other men in the lineup were wearing street clothes, appellant was wearing prison garb, i.e., a jumpsuit.

In *State* v. *Sheardon* (1972), 31 Ohio St. 2d 20, 60 O.O. 2d 11, 285 N.E. 2d 335, paragraph two of the syllabus, this court held with respect to police lineups that:

"The due process clause of the Fifth and Fourteenth Amendments forbids any pre- or post-indictment lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. * * *"

See, also, *Kirby* v. *Illinois* (1972), 406 U.S. 682. A reviewing court should examine the factors surrounding the actual eyewitness incident to determine whether the witness is susceptible to suggestion which would lead to an irreparable, mistaken identification. See *Neil* v. *Biggers*, *supra*.

In the case *sub judice* Wright was able to describe the clothes that Devon and the victim wore. Wright was able to recognize that appellant's hair in court was shorter than it had been at the scene of the kidnapping. In applying the *Biggers* factors (see discussion at II B, *supra*), we find that Wright had ample opportunity to independently observe and identify appellant. Furthermore, he unequivocally displayed his ability to identify the defendant based on his recollection of the defendant's conduct. Accordingly, this proposition of law is not well-taken.

V

In his ninth proposition of law appellant asserts that inflammatory and gruesome photographs were admitted in the guilt phase of the trial, thereby violating certain of his state and federal constitutional rights. Specifically, appellant argues that the photographs were inflammatory and cumulative, thereby outweighing any probative value of the evidence. Therefore, appellant maintains that the photographs should have been excluded from evidence pursuant to Evid. R. 403.[1]

In *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, 15 OBR 379, 473 N.E. 2d 768, paragraph seven of the syllabus, we held:

"Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number."

As we stated in *State* v. *Morales* (1987), 32 Ohio St. 3d 252, 258, 513 N.E. 2d 267, 274, "the emphasis that a trial judge must apply in meeting an Evid. R. 403 objection has changed in capital cases. To be admissible in a capital case, the probative value of each photograph must outweigh the danger of prejudice to the defendant and, additionally, not be repetitive or cumulative in nature. Contrary to the Evid. R. 403 standard, where the probative value must be minimal and the prejudice great before the evidence may be excluded, pursuant to *Maurer*, *supra*, if the probative value does not, in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant, the evidence must be excluded."

In reviewing the photographs we find that only four are gruesome. Two of these show the victim on the coroner's table. Specifically, one of these photos shows the victim partially clothed, with her blue jeans pulled down and her blouse torn about her torso, while the other shows the victim without clothes. These photos appear to be cumulative due to their angle and distance from the subject matter. Although these photographs show the badly decomposed and injured face of the victim with maggots present, they cannot be readily seen due to the distance of the camera in relation to the body. The other two gruesome photos show closer views of the torso and face, where the body was found; however, they are not repetitious or cumulative since they emphasize different portions of the deceased. Of the remaining photos, some show merely the same wounds at different distances or angles, but are not particularly gruesome. According to *State* v. *Thompson* (1987), 33 Ohio St. 3d 1, 9, 514 N.E. 2d 407, 416 "[t]he portrayal of the identical subject matter in two slides, one from a relative distance and the other from a close proximity to the subject matter, is clearly repetitive in nature." Assuming in this case that some of the photographs should not have been admitted due to their repetitive or cumulative nature, any error was harmless under *Thompson*, *supra*, since several witnesses saw appellant kidnap the victim and since Devon Stapleton saw appellant attack his mother. Clearly, the three-judge panel would have convicted appellant even if the photographs had not been introduced into evidence.

[1] Evid. R. 403 provides:

"(A) *Exclusion mandatory.* Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

"(B) *Exclusion discretionary.* Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

Accordingly, appellant's ninth proposition of law is overruled.

VI

Appellant's tenth proposition of law states that he was denied a fair trial because the court failed to record side bar conferences. We note initially that appellant failed to raise this issue below. Therefore, we review this proposition under the plain error standard of review. See Crim. R. 52(B).

No evidence is presented by appellant that he was prejudiced. There was no objection by defense counsel, nor did defense counsel urge the court to record the side bar conferences.

App. R. 9(A) requires that "[i]n all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means." Crim. R. 22 dictates that all proceedings shall be recorded in all "serious offense cases." Where a proceeding has not been preserved counsel may invoke the procedure of App. R. 9(C) or 9(E) to reconstruct what was said or to establish its importance. "In the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice, the error may be considered waived." *State* v. *Brewer* (1990), 48 Ohio St. 3d 50, 60-61, 549 N.E. 2d 491, 502; *United States* v. *Gallo* (C.A.6, 1985), 763 F. 2d 1504, 1529-1532, certiorari denied (1986), 475 U.S. 1017.

Since appellant in the instant case has not complied with the above procedures, and absent a showing of prejudice, there is no evidence that appellant was denied a fair trial. Accordingly, appellant's tenth proposition of law is not well-taken.

VII

In his eighth proposition of law, appellant alleges that aggravated murder and kidnapping are allied offenses of similar import and, therefore, he cannot be convicted of both crimes.

R.C. 2941.25 sets the parameters for when the state may obtain convictions for two or more allied crimes of similar import. Generally, R.C. 2941.25(A) bars the state from obtaining convictions for allied offenses of similar import:

"Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

As an exception to this bar, R.C. 2941.25(B), allows convictions for allied offenses of similar import, when the defendant's "* * * conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each * * *." The two-tiered test for determining whether two or more offenses are allied offenses of similar import was recently reviewed by this court in *Newark* v. *Vazirani* (1990), 48 Ohio St. 3d 81, 549 N.E. 2d 520, syllabus, where we stated that "* * * [i]n the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses. (*State* v. *Blankenship* [1988], 38 Ohio St. 3d 116, 117, 526 N.E. 2d 816, 817, approved and followed)." (Emphasis *sic*.)

A comparison of the elements of kidnapping and aggravated murder clearly shows that they are not similar. Kidnapping, as charged in this case, involves the removing of a person by force, threat, or deception from the place where he is found, or restraining him of his liberty, to facilitate the commission of a felony or the flight thereafter and/or to terrorize or inflict serious physical harm on the victim. R.C. 2905.01(A)(2) and (3). The aggravated murder count in this case charged appellant with purposely causing the death of another while committing or attempting to commit kidnapping. R.C. 2903.01(B).

In *State* v. *Logan* (1979), 60 Ohio St. 2d 126, 14 O.O. 3d 373, 397 N.E. 2d 1345, syllabus, this court was confronted with the question of when a defendant may be convicted of kidnapping and another offense of the same or similar kind under R.C. 2941.25. The guidelines set forth are as follows:

"* * *

"(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

"(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."

Accord *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 197-198, 15 OBR 311, 339-340, 473 N.E. 2d 264, 295; *State* v. *Maurer*, *supra*, at 243, 15 OBR at 382-383, 473 N.E. 2d at 775.

Here, the kidnapping was complete and independent of the murder. The appellant forced the victim into a van and completed the kidnapping when he drove off. He later murdered the victim. Clearly, the kidnapping was more than merely incidental to the underlying crime of murder. Accordingly, this proposition of law is not well-taken.

VIII

In appellant's second proposition of law he contends that in comparing the aggravating circumstances with the mitigating factors, the three-judge panel relied on the "nature and circumstances" of the offense as nonstatutory aggravating circumstances in violation of his state and federal constitutional rights. Specifically, appellant points out that the trial court referred in its opinion to the "aggravating circumstances" of the case in the plural instead of in the singular, thereby implying that it considered more than one aggravating circumstance. We find this proposition of law wholly without merit.

This court held in *State* v. *Stumpf* (1987), 32 Ohio St. 3d 95, 512 N.E. 2d 598, syllabus, "[u]nder R.C. 2929.03 (F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors."[4] Further, this court has stated

[4] We note parenthetically the recent United States Supreme Court decision of *Clemons* v. *Mississippi* (1990), 494 U.S. ___, ___, 108 L. Ed. 2d 725, 736, 110 S. Ct. 1441, 1446, where the court held:

"Nothing in the Sixth Amendment as

that "[i]n its sentencing opinion, it * * * [is] wholly proper for the panel to rely upon and cite the nature and circumstances of the offense as reasons for supporting the finding that the aggravating circumstance outweighed the mitigating factors. *Stumpf, supra.* We presume that the panel * * * [knows] the difference between an aggravating circumstance on the one hand and the nature and circumstances of the crime on the other hand. Simply because the panel [in this case] referred to aggravating circumstances does not mean that the nature and circumstances of the crime became a nonstatutory aggravating circumstance." *State* v. *Moreland, supra,* at 69, 552 N.E. 2d at 905.

The trial court in its opinion merely cited the nature and circumstances of the *offense*, not any additional nonstatutory aggravating circumstances. There is no evidence that the three-judge panel considered any nonstatutory aggravating circumstances. Thus, appellant's argument that because the three-judge panel used "circumstances" in the plural, nonstatutory aggravating circumstances were considered is without merit. Accordingly, appellant's second proposition of law is overruled.

IX

Appellant in his third proposition of law alleges that although the three-judge panel found two mitigating factors, it failed to consider other evidence of mitigating factors pursuant to R.C. 2929.04(B)(7)[4] and to weigh relevant mitigating factors. The court found as mitigating factors (1) the youth of the offender, and (2) that the defendant lacked a significant history of prior criminal involvement, although he did have a delinquency adjudication. However, it did not find that the mitigating factors outweighed the aggravating circumstances of the crime. There is no evidence that the court failed to consider any mitigating factors or that it failed to weigh the mitigating factors that it found the appellant established.

Next appellant attacks the trial court's use of a preponderance of evidence standard in determining whether mitigation has been established. This standard has been approved by this court in *State* v. *Stumpf, supra,* at 101, 512 N.E. 2d at 605.

Appellant also maintains that the trial court applied the standard of proof beyond a reasonable doubt when determining the existence of other mitigating factors. There is no

construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. * * *"

This decision by the Supreme Court is in line with the requirement that Ohio appellate courts make a separate independent review of death sentences for appropriateness and proportionality, regardless of whether the case is tried to a three-judge panel or jury. See R.C. 2929.05. Thus, in section XIV of this opinion, *infra*, we have weighed the aggravating *circumstance*, and conclude that it outweighs the mitigating factors beyond a reasonable doubt. Therefore, even if the three-judge panel considered a nonstatutory aggravating circumstance as alleged, we independently determine that the sole aggravating circumstance outweighs the mitigating factors. Consequently, appellant's proposition of law is overruled as to this issue.

[4] R.C. 2929.04(B)(7) requires that the court consider "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death."

evidence that the court required appellant to prove beyond a reasonable doubt the existence of any mitigating factor. The language the court used was: "[t]his Court finds beyond a reasonable doubt that the defendant offered no sufficient proof of any of the factors enumerated in Subsection B of the Ohio Revised Code 2929.04." It is obvious that the court was not requiring the defendant to prove the mitigating factors beyond a reasonable doubt. Rather, the court used this language to ensure that it gave such thorough consideration that it was able to find beyond a reasonable doubt that further mitigation was not established. Accordingly, this proposition of law is not well-taken.

X

In his twelfth proposition of law[4] appellant alleges that it is unconstitutional to impose the death penalty based on the commission of a felony murder where the aggravating circumstance merely duplicates an element of the felony murder.

We have previously addressed this issue and have upheld its constitutionality in *State* v. *Jenkins, supra,* at 177-178, 15 OBR at 322-323, 473 N.E. 2d at 279-280, and *State* v. *Poindexter* (1988), 36 Ohio St. 3d 1, 4, 520 N.E. 2d 568, 571.

XI

In appellant's thirteenth proposition of law he alleges that the proportionality review used by this court, in which only the cases in which the defendant has been sentenced to death are used for comparison, is unconstitutional. This court previously decided this issue in *State* v. *Steffen* (1987), 31 Ohio St. 3d 111, 124, 31 OBR 273, 284, 509 N.E. 2d 383, 395, by holding:

"No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not." See, also, *State* v. *Jenkins, supra,* at 176-177, 15 OBR at 322, 473 N.E. 2d at 279. Therefore, pursuant to *Poindexter, supra* (see discussion at footnote six of this opinion) we summarily overrule this proposition of law.

XII

In his fourteenth proposition of law appellant argues that Ohio's death penalty statute is unconstitutional. All these arguments have been addressed by this court and have found to be not well-taken. See *State* v. *Wickline* (1990), 50 Ohio St. 3d 114, 124, 552 N.E. 2d 913, 923-924; *State* v. *Buell* (1986), 22 Ohio St. 3d 124, 22 OBR 203, 489 N.E. 2d 795; *State* v. *Maurer, supra; State* v. *Zuern* (1987), 32 Ohio St. 3d 56, 512 N.E. 2d 585; *State* v. *Jenkins, supra.*

Since appellant has not presented any compelling reason why we should now find the statute to be unconstitutional, we reject appellant's fourteenth proposition of law.

XIII

In his eleventh proposition of law appellant suggests that Ohio's mandatory sentencing scheme is unconstitutional since it provides that if the three-judge panel finds that the aggravating circumstances outweigh the

[4] In *State* v. *Poindexter* (1988), 36 Ohio St. 3d 1, 520 N.E. 2d 568, syllabus, we stated with respect to issues which have been treated previously in capital cases that, "[w]hen issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case."

Headnotes

mitigating factors it is required to impose the death penalty.[1]

The United States Supreme Court has recently decided that a mandatory sentencing scheme such as Ohio's is not unconstitutional. *Blystone* v. *Pennsylvania* (1990), 494 U.S. ___, 108 L. Ed. 2d 255, 110 S. Ct. 1078; *Boyde* v. *California* (1990), 494 U.S. ___, 108 L. Ed. 2d 316, 110 S. Ct. 1190. Accordingly, this proposition is not well-taken.

XIV

Finally, we must independently review the death sentence for appropriateness and proportionality.

Appellant killed Ruby Stapleton after first kidnapping her and her child off the streets of Cleveland, Ohio. We find that the aggravating circumstance is proved beyond a reasonable doubt.

Appellant introduced in mitigation that he had no significant history of prior criminal conduct, he could possibly adapt well to imprisonment, his youth (twenty-one years old), and his low intelligence.

Weighing the various mitigating factors against the aggravating circumstance, we conclude that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

In comparing the sentence of death in this case to those cases where we have previously imposed the death sentence we find the sentence here is neither excessive nor disproportionate to sentences for other kidnapping/murder convictions upheld by this court. See, *e.g.*, *State* v. *Morales*, *supra*; *State* v. *Broom* (1988), 40 Ohio St. 3d 277, 533 N.E. 2d 682.

For the foregoing reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, DOUGLAS, WRIGHT, H. BROWN and RESNICK, JJ., concur.

[1] R.C. 2929.03(D)(3) as relevant to this case provides:

"Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it *shall impose sentence of death* on the offender. * * *" (Emphasis added.)

ASSIGNMENTS OF ERROR RAISED IN THE COURT OF APPEALS

I. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING FIVE YEAR-OLD DEVON STAPLETON COMPETENT TO TESTIFY

II. THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE MOTION TO SUPPRESS SUGGESTIVE PHOTOGRAPHIC ARRAYS

III. THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE MOTION TO SUPPRESS THE IDENTIFICATION TESTIMONY ARISING FROM AN UNDULY SUGGESTIVE LINE-UP

IV. THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO FIND THE DEFENDANT-APPELLANT GUILTY OF CAPITAL MURDER AND KIDNAPPING.

V. THE TRIAL COURT ERRED BY ALLOWING A POLICE OFFICER TO GIVE EXPERT OPINION AS TO SHOE PRINT EVIDENCE AND ADMITTING EXHIBITS RELATING TO SAID TESTIMONY

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING INTO EVIDENCE A GRUESOME PHOTOGRAPH WHICH CONTAINED LITTLE PROBATIVE VALUE, THEREBY DENYING APPELLANT'S CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL

VII. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH BY 1) NOT CONSIDERING ALL THE MITIGATING FACTORS; 2) CONSIDERING NON-STATUTORY AGGRAVATING FACTORS; AND 3) FAILING TO STATE ITS REASONS, IN VIOLATION OF OHIO REVISED CODE §2929.03(F), THEREBY VIOLATING APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

VIII. THE AGGRAVATING CIRCUMSTANCE OF WHICH APPELLANT WAS CONVICTED DOES NOT OUTWEIGH THE MITIGATING FACTORS

IX. APPELLANT'S SENTENCE OF DEATH IS EXCESSIVE AND DISPROPORTIONATE TO SIMILAR CASES AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW

X. THE TRIAL COURT ERRED BY CONVICTING APPELLANT OF A SPECIFICATION WHICH DUPLICATED AN ELEMENT OF THE PRINCIPLE OFFENSE AND THEREBY DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS OF LAW AND AGAINST CRUEL AND UNUSUAL PUNISHMENT . . . . . .

XI. IMPOSITION OF THE DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§2, 9, 10 AND 16 OF THE OHIO CONSTITUTION .

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 54733

STATE OF OHIO Plaintiff-Appellee -vs- REGINALD JELLS Defendant-Appellant	:	SUPPLEMENTAL JOURNAL ENTRY and APPELLATE REVIEW OF DEATH SENTENCE

DATE OF ANNOUNCEMENT OF DECISION: APRIL 20, 1989

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. CR-217570

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION: MAY -1 1989

APPEARANCES:

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VOL 253 PG 948

POSTED

DYKE, J.:

R.C. 2929.05(A) provides in pertinent part:

> "Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court."

As required by this statute and after reviewing the trial court's judgment, the sentence of death, the transcript and all the facts and other evidence in the record in this case, this Court makes the following independent findings:

1) The evidence supports the findings by the trial jury and trial judge that the defendant was guilty of an aggravated circumstance.

2) The aggravating circumstance of which the defendant was found guilty outweighs the mitigating factors in this case.

3) The trial court properly weighed the aggravated circumstance and the mitigating factors.

4) The death sentence imposed in this case is not excessive or disproportionate to the penalty imposed in similar cases.

VOL 253 PG 949

5) The sentence of death imposed on the defendant is appropriate in this case.

JOURNALIZED MAY -1 1989
GERALD E. FUERST, Clerk of Courts
By [illegible] Deputy

JOHN V. CORRIGAN, P.J., and
J.F. CORRIGAN, J., CONCUR

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APR 20 1989
GERALD E. FUERST, CLERK
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JUDGE
ANN DYKE

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 54733

STATE OF OHIO Plaintiff-Appellee -vs- REGINALD JELLS Defendant-Appellant	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT OF DECISION:	APRIL 20, 1989
CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas Case No. CR-217570
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	
APPEARANCES:	

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DYKE, J.:

On April 18, 1987, at approximately 10:30 p.m., the victim in this case, Ruby Stapleton, and her four year old son, Devon were abducted by a man at the intersection of Lakeview and Euclid Avenues in Cleveland, Ohio. Devon Stapleton was abandoned, physically unharmed, at a Cleveland intersection at approximately 12:15 a.m. Clyde Smith, a passerby, picked up the wandering confused child and took him to safety. On April 28, 1987, Ruby Stapleton's body was discovered in a junkyard in Cleveland, Ohio.

The following individuals witnessed the abduction: Owen Banks, Edward L. Wright, Camilla Banks and Patricia Green. On April 18, 1987, at the intersection of Lakeview and Euclid Avenues these people saw a man grab a woman and force her into the front passenger seat of a van. They also saw this man pick up a small boy and put him in the back of the van. The man then drove off. Owen Banks, Edward Wright and Camilla Banks later identified the victim in this case, Ruby Stapleton, as the woman they saw being forced into the van. Owen Banks, Camilla Banks and Edward Wright also identified the appellant in this case, Reginald Jells, as the man they saw forcing Ruby Stapleton into the front seat of the van. These three witnesses also were able to identify the van used in the abduction. Edward Wright identified Devon as the little boy who was placed in the back of the van by the appellant.

Owen Banks testified that he and his daughter Camilla Banks were on their way home when they heard screams. He witnessed a man and woman tussling. Owen Banks jumped out of his car and on his way to the scuffle yelled to his daughter to write down the license plate number of the van. Banks approached the van from the back and saw a man throw Ruby Stapleton into the front passenger seat of a van and put a little boy in the back. Banks testified he heard the woman yell "Help, help." Banks backed off at the urging of his daughter who feared that the kidnapper might have a gun. Banks recalled that the van used in the abduction had a sign on it which said "Keep on Truckin." It was shown at trial that appellant's van had a sign on it which said "Keep on Vannin."

Camilla Banks stated that she too saw a man and woman fighting and that the man forced the woman into the van. She also witnessed a small boy walking alongside the man and woman. Camilla also testified that she heard the woman yelling for help. At her father's direction, Camilla wrote down the license plate number of the van. The license number was registered to the appellant.

The appellant later admitted that the van identified by these witnesses belonged to him.

Patricia Green testified that she too witnessed the abduction. Green stated that on April 18, 1987 she was a passenger in the car of her brother-in-law when she heard a black lady hollering. Her brother-in-law got out of the car and asked the

woman if she was alright. The woman just kept screaming. Green said she saw a man grab the woman and place her in the driver's side of the van. Green testified that the man then put a child in the back of the van.

Edward Wright testified that on April 18, 1987, as he was leaving his place of employment, he heard a woman scream from across the street. Wright identified the appellant as the man who held a woman around her waist and who threw her into the van. Wright stated that the woman was wearing a pink or red t-shirt and jeans. Wright saw Devon follow his mother and saw him being placed into the van.

At the time of the kidnapping these witnesses testified that they did not see the appellant use a weapon against Ruby or Devon nor did they notice any blood or wounds on Ruby.

Devon Stapleton took the stand and testified that on the night in question he and his mother were enroute from his father's bar. Devon stated that as he and his mother were trying to go to Coventry Road, the appellant asked his mother if they wanted a ride. Devon's testimony indicated that he and his mother were either forced into the appellant's van by the appellant or that they entered it voluntarily. At about 10:30 p.m. Ruby Stapleton escaped from the van causing the appellant to stop and physically force her and Devon back in. This is the abduction witnessed by Owen and Camilla Banks and Edward Wright. Devon testified that they drove around for a long

time. Devon stated that he saw the appellant hit his mother twice with a "silver thing." After his mother was hit, Devon stated she "got knocked out." Blood was splattered on Devon's clothes.

Devon testified that at some point the appellant carried his mother from the van. Devon recalled seeing a junkyard and that the appellant opened a big fence. Devon could not see where the appellant took his mother. The appellant returned to the van, drove around some more, and eventually stopped at a gas station. Devon testified that he was later abandoned near a junkyard. Devon stated that he just stood there until some man picked him up.

Clyde Smith testified that in the early morning hours of April 19, 1987 he came upon a child who had been abandoned on the street. Smith testified that the child was crying. Smith picked up the child and took him to his [Smith's] home. Devon kept telling Smith that his mother was over a fence and that he could not get to her because of the wire. Smith called the police. Smith's wife, Anita, noticed a shiny substance on Devon's coat which she thought to be blood. Devon stated that the blood was his mother's and that a man had thrown him out of a van.

On April 26, 1987 Officer Patrick Gillissie arrested the appellant in his van. The arrest was based on the description of the van and its license plate number given by Camilla Banks. The appellant, upon questioning stated that the van belonged to

him. The van was confiscated for processing. Bloodstains were found in the van and determined to be those of the victim, Ruby Stapleton.

On April 28, 1987 Officer Verlin Peterson decided to look for the victim's body on his own time. He found the body of Ruby Stapleton in a junk yard at East 84th Street and Grand Avenue in Cleveland, Ohio. The body of Ruby Stapleton was partially clad. Her underwear and jeans had been pulled down. She was wearing a pink blouse.

The processing of the van also revealed that there were other fingerprints present besides that of the appellant. Those fingerprints could not be compared with the victim's due to the body's state of decomposition. A transmission jack was found and its top matched the marks found on the victim's body. The appellant's pants and tennis shoes which were recovered were found to be stained with human blood. Lastly, a shoe print was found on the inside of the van's windshield which later was showed to match that of the victim's left tennis shoe.

The defense called one witness, Ramon Calhoun. Calhoun and appellant lived in the same apartment building. He testified that on April 18, 1987 at approximately 7:00 p.m. he had eaten popcorn with the appellant. Calhoun stated that at 7:30 p.m., appellant went upstairs to take a bath. Calhoun did not see appellant leave the premises. Calhoun said that at about 11:30 p.m., he heard the appellant slamming his door.

On August 31, 1987 appellant was convicted, by a three judge panel, of Aggravated Murder [R.C. 2903.01] with a specification for Kidnapping [R.C. 2905.01]. The kidnapping specification stemmed from the abduction of Ruby and Devon Stapleton. On September 18, 1987, after a sentencing hearing on the death penalty provisions, the court sentenced appellant to death.

The appellant assigns eleven errors for review.

I.

"THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING FIVE YEAR-OLD DEVON STAPLETON COMPETENT TO TESTIFY."

Appellant asserts that five year old Devon Stapleton should have been determined incompetent to testify.

Evid. R. 601(A) provides:

> "Every person is competent to be a witness except:
>
> "(A) Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the fact and transactions respecting which they are examined, or of relating them truly and; ***."

Under this statement a person who is less than ten years of age is incompetent to testify unless the court determines that the child has the ability to observe, recall and relate accurately, and to understand the duty to testify truthfully. State v. Wallace (1988), 37 Ohio St. 3d 87; State v. Workman (1984), 14 Ohio App. 3d 385; State v. Wilson (1952), 156 Ohio St. 525. In Wilson the court stated:

> "The child's appearance, fear or composure, general demeanor and manner of answering, and any indication of coaching or instruction as to answers to be given are as significant as the words used in answering during the examination, to determine competency."

The record demonstrates that the judge conducted a voir dire examination of Devon before ruling upon his competency as a witness. In the course of the examination, counsel for the state and the defense were afforded an opportunity to inquire into the child's understanding of the relevant events as well as his appreciation of his duties as a witness.

Appellant attacks Devon's competency on the ground that he was unable to understand the necessity of telling the truth.

The record clearly indicates that Devon had the ability to observe, recall and relate accurately the events of the evening at issue. Devon was able to identify the vehicle he was kidnapped in as well as recall the time of day in which the kidnapping took place. He was able to describe the circumstances and location of the kidnapping and the object that was used to beat his mother. He was able to relate where his mother was hit and the fact that "she got knocked out," and did not move after that. Devon stated that, as a result of the blow, his mother bled down the right side of her face and that some of her blood splattered on his coat. Devon was able to recall that his mother was then taken out of the van on the driver's side by the appellant and taken into a junk yard. Devon stated that the appellant opened a big fence in order to get into the junkyard. Devon next recalled that after appellant returned from the junkyard without his mother, they drove to a gas station. Devon testified that he was then dropped off and eventually a strange

man came by and picked him up. Devon was able to identify the man who picked him up and the man's wife and children.

Devon accurately related the way he, his mother and the appellant were dressed that evening. Devon also described the fact that the interior of the van had a "thing that looked like a couch in it," as well as being carpeted.

The record clearly indicates that Devon Stapleton had the intellectual capacity to accurately recount the events. Thus, the first part of the two part test is satisfied.

We reject appellant's assertion that the trial court abused its discretion in determining that Devon understood the necessity of telling the truth. The transcript discloses that Devon stated that it was good to tell the truth and bad to lie. Devon stated that he prayed to God and that the events he had described to other people concerning his mother's death were the truth. Devon stated that he knew what it meant not to tell the truth and that he had on an earlier occasion not told the truth. Devon promised to tell the truth upon questioning and that if he didn't understand he would look up to the judge. Further, Devon was able to give an example of what it meant to tell the truth:

"Q: Do you know what the truth is?

"A: Yes.

"Q: What is the truth?

"A: You say it and tell it was cold outside when you see its cold.

"Q: That would be the truth, then, right?

"A: Yes.

"Q: Do you tell the truth?

"A: Yes."

Appellant takes several questions and answers from the record and argues that Devon's responses indicated an inability on his part to comprehend the necessity of telling the truth. Appellant further argues that Devon's responses indicated that he was easily led and that his testimony had been clearly coached.

Appellant specifically complains of the following responses:

1) "Q. Anybody tell any lies on T.V.

"A. No.

"Q. Do you know what a lie is?

"A. No."

2) "Q. The Court: Did you ever not tell the truth?

"A. Witness: When I was four I did.

"Q. When you were four years old, maybe you didn't.

"A. Huh?

"Q. Did you ever not tell the truth?

"A. When I was a little baby."

3) "Q. What time do you go to bed at night?

"A. I don't know.

"Q. Do you know how to tell time, Devon?

"A. Yes.

"Q. You do? Do you know when it's five o'clock or six o'clock, or something like that?

"A. No.

"Q. Do you know when its morning or afternoon?

"A. In the morning.

"Q. Do you know what the difference between the morning and the afternoon is?

"A: No.

"Q. How about night time? What time would it be at night, do you know?

"A. No."

We cannot say that these out of context responses indicated an inability on Devon's part to tell the truth. Initially we note that the question posed regarding lies on T.V. was a difficult confusing question and that Devon's response was not unreasonable. In the second series it is evident that Devon was trying to relay to the questioner that he had in the past told an untruth. This, if anything, indicates the child was aware of the difference between telling the truth and lying as he was trying to relate a past incident in which he had lied. The last series of questions certainly contain discrepancies but we reject the assertion that this testimony is indicative of an inability to comprehend the truth. These statements were made in the middle of lengthy testimony, an experience no doubt difficult for a five year old child. It represents a certain wandering but given the totality of the testimony is not determinative.

The record indicates that the trial court had before it evidence which supported the trial court's finding that Devon was competent to testify.

Appellant's argument that Devon's testimony indicated he was coached, easily led, and inattentive is without merit. This argument amounts to appellant's simple comment on Devon's credibility. "The determination of competency is within the sole discretion of the trial court. Absent a showing of an abuse of discretion by the trial court, this court will not disturb its ruling." State v. Lee (1983), 9 Ohio App. 3d 282.

We conclude that the trial court did not abuse its discretion in determining that Devon understood the necessity of telling the truth. The trial court acted properly in permitting Devon to testify.

Appellant's first assignment of error is without merit.

II.

"THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE MOTION TO SUPPRESS SUGGESTIVE PHOTOGRAPHIC ARRAYS.

"THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE MOTION TO SUPPRESS THE IDENTIFICATION TESTIMONY ARISING FROM AN UNDULY SUGGESTIVE LINE-UP."

It is appellant's contention under his second and third assignments of error that the photographic and line-up identification procedures used by police were so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. We find no merit in appellant's argument.

A defendant's right to due process is violated only if the "... photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. U.S. (1968), 390 U.S. 377; State v. Perryman (1976), 49 Ohio St. 2d 14, vacated on other grounds (1978), 438 U.S. 911. This same test is applied in analyzing a line-up. To determine the reliability of the pre-trial identification in each case, the fact finder must look at the "totality of the circumstances." Stoval v. Denno (1966), 388 U.S. 292. The factors to be considered are:

> "The opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Neil v. Biggers (1975), 409 U.S. 189, 199.

In addition, "the appellant has the burden to convince the court that the identification procedures were both suggestive and unnecessary ***." State v. Sims (1984), 13 Ohio App. 3d 287.

Appellant argues that the photographic arrays showed to witnesses Owen Banks, Camilla Banks and Devon Stapleton were unduly suggestive and further that their identifications were not sufficiently reliable to undo the taint of the unduly suggestive procedure. Appellant complains that his photograph used in the arrays made him look especially dark and especially big. As Devon Stapleton had earlier indicated to police that the abductor was "black black" and "real big", appellant claims

that the photographic array made him stick out like a sore thumb and thus cause his photo to be chosen above others.

The Biggers factors indicate that the identification of these witnesses was reliable.

It is clear that Devon got a good view of the assailant. Devon was in the appellant's van and able to observe the appellant for an extended period. He saw the appellant hit his mother with a silver object and saw her blood splatter. He saw the appellant knock his mother unconscious, carry her into a junkyard and return to the van. Devon stated he was eventually dropped off by the appellant. Devon's ability to relay accurately these events indicated he paid a good deal of attention the night his mother and him were kidnapped and his mother murdered. Further, the information relayed by Devon was substantiated by scientific and physical evidence. Devon described the appellant as "real big" and "black black." Given the child's age and the fact that he was able to recall the night's events in detail, we conclude that his description of the appellant was not indeterminatively vague. Further, Devon identified the appellant with great certainty the day after appellant's arrest. We find nothing unreliable in Devon's out of court identification.

Owen Banks, the next witness appellant complains of, also had a good opportunity to view the abductor. Banks saw the victim struggling with the appellant and went right up to the

driver's side of the van and looked straight at the appellant in order to elicit an explanation from the appellant. Banks was able to describe the van and able to identify Devon as the little boy appellant put in the back. Banks gave a detailed description of the events he witnessed which corroborated Devon's testimony. Banks testified that he recognized the appellant in the photographs "right off." Banks viewed the array about a week after the event.

Camilla Banks also had an unobstructed view of the appellant and his conduct. Ms. Banks obviously was paying close attention to the night's events as she yelled for her father to retreat because she feared the appellant might be armed. Ms. Banks described the appellant as seven feet tall. In fact, he was not. However, this description to some degree corroborates the testimony of Owen Banks and Devon in that all of them indicated the appellant was tall. Ms. Banks believed with certainty that the photograph of the appellant was the perpetrator.

Under the totality of the circumstances, the identifications of the appellant made by Devon Stapleton, Owen Banks and Camilla Banks were reliable. Consequently, regardless of the validity of the identification procedures used by the state, the identification testimony of these witnesses was properly admitted.

Appellant also complains of the identification testimony of Edward Wright arising from what he complains to be an unduly suggestive line-up. Again, we find appellant's complaint to be without merit. Applying the Biggers factors we find that Wright

was able to view the appellant under fair lighting conditions from a close distance. Wright testified that his attention was focused on the appellant who had a woman in his arms. Wright testified that he was able to look inside the van at one point and see the appellant and the victim. Wright was able to record the license plate number of the van, its description and a description of the victim and Devon. He described the appellant to police as being six feet one inch wearing a black t-shirt and blue jeans. Wright described the appellant's hair as dirty and nappy. Wright testified that when he viewed the line-up he didn't pay much attention to the others as he recognized the appellant as the man he saw on that night.

We conclude again that given the totality of the circumstances, Edward Wright demonstrated sufficient independent reliable recollection to have identified appellant as the assailant and to have thereby defeated appellant's motion to suppress.

Appellant's second and third assignments of error are without merit.

III.

"THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO FIND THE DEFENDANT-APPELLANT GUILTY OF CAPITAL MURDER AND KIDNAPPING."

In this assignment of error, appellant challenges the sufficiency of the evidence supporting his aggravated murder conviction and its accompanying specifications.

State v. Bridgeman (1978), 55 Ohio St. 2d 261 sets forth the test for sufficiency review:

> "Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." See also State v. Barnes (1986), 25 Ohio St. 3d 203, 209.

Further, it is within the purview of the jury to assess the credibility of the witnesses. State v. DeHass (1967), 10 Ohio St. 2d 230.

R.C. 2903.01 defines aggravated murder and provides in pertinent part:

> "(A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping ***."

The court convicted appellant of the following aggravating circumstances as set forth in R.C. 2929.04(A).

> "(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, *** and *** the offender was the principal offender in the commission of the aggravated murder ***."

Kidnapping is defined by R.C. 2905.01. The relevant portion of that statute provides:

> "(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:
>
> "(1) To hold for ransom, or as a shield or hostage;
>
> "(2) To facilitate the commission of any felony or flight thereafter;
>
> "(3) To terrorize, or to inflict serious physical harm on the victim or another;

"(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against his will;

"(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

"(B) No person, by force, threat, or deception, or in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances which create a substantial risk of serious physical harm to the victim:

"(1) Remove another from the place where he is found;

"(2) Restrain another of his liberty; ***."

The appellant argues that the State did not prove that the appellant intended to commit a felony at the time he abducted Ruby Stapleton and further that the evidence is insufficient to sustain a conviction of kidnapping.

In this case four witnesses, Camilla Banks, Owen Banks, Edward Wright and Devon Stapleton testified that the kidnapping was intentional and forceful. All four identified the appellant as the perpetrator. Patricia Green's testimony also indicates that the abduction was deliberate and forceful. Camilla and Owen Banks, Edward Wright and Devon Stapleton all identified the appellant's van as the one used the night of the abduction. Owen and Camilla Banks, Devon and Wright identified the victim, Ruby Stapleton, as the woman the appellant picked up and threw into the van. It is clear from the evidence presented by the State that Ruby Stapleton was forced, against her will, into the van and that Devon was alao placed into the van.

As discussed in the facts, the evidence showed that Ruby Stapleton while in the van was beaten with some sort of silver object and that she was "knocked out" as a result and dragged into a junk yard. The evidence further showed that Ruby Stapleton's blood was found in the van along with a shoeprint which matched the left tennis shoe recovered on her body. A transmission jack was also found in appellant's van which matched the marks found on the victim's body. Appellant unequivocally stated that the van, which four witnesses had identified as belonging to the perpetrator of the kidnapping, belonged to him.

Keeping in mind the standard of review set forth in Bridgeman, we find a trier of fact could reasonably find the appellant guilty of aggravated murder of Ruby Stapleton with prior calculation and design and that appellant killed her while committing a kidnapping.

Appellant's assignment of error is overruled.

IV.

"THE TRIAL COURT ERRED BY ALLOWING A POLICE OFFICER TO GIVE EXPERT OPINION AS TO SHOE PRINT EVIDENCE AND ADMITTING EXHIBITS RELATING TO SAID TESTIMONY."

Appellant argues that the trial court erred when it permitted Detective James Yonkers to testify over defense objection, that, in his opinion a shoe print found near the site of the victim's body matched a shoe belonging to appellant and that a shoe print lifted from the van's windshield matched a shoe the victim was wearing.

In Gannett v. Booker (1983), 12 Ohio App. 3d 49 the court stated:

> "The test in determining the admissibility of the testimony of a witness offered as an expert is whether that witness will aid the trier of fact in search of the truth (See Ishler v. Miller [1978], 56 Ohio St. 2d 447, 453 [10 O.O. 3d 539], and Evid. R. 702), rather than whether the expert witness is the best witness on the particular subject. Alexander v. Mt. Carmel Medical Center (1978), 56 Ohio St. 2d 155, 159. [10 O.O. 3d 332]. *** Further the weight to be given this evidence, however, should be determined by the trier of fact just as it determines the weight to be given the testimony of other witnesses."

Detective Yonkers testified that he was employed as a Cleveland Police Officer for eighteen years. In the past two years he stated that he was a Detective with the Scientific Investigation Unit, the forensic lab. He testified that his job in the forensic lab entailed distinguishing tool marks and working with trace evidence. He stated that he was a firearms exxpert, had been a gunsmith for twenty three years, five of which he was head gunsmith with the City of Cleveland. Yonkers stated that he received trace evidence training and training in footprint comparison from the superintendent of criminalistics. The record indicates that Yonkers had examined shoe prints on previous occasions. He testified that his work also involved the comparison of grooves, striations, wear marks, and general overall appearances of bullets.

Yonkers opinion as to the comparisons of the shoes and prints was not based upon the results of any test. His opinion resulted from observing and comparing the patterns and worn

spots of the prints and shoes. Yonkers admitted on cross-examination that he had never taken a foot print from a windshield. Yonkers used a footprint found on the windshield to compare to the victim's shoe.

We conclude that Detective Yonkers testimony went to weight and not admissibility. The trial court did not abuse its discretion in allowing his testimony or the accompanying exhibits to be admitted.

Appellant's fifth assignment of error is without merit.

V.

> "THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING INTO EVIDENCE A GRUESOME PHOTOGRAPH WHICH CONTAINED LITTLE PROBATIVE VALUE, THEREBY DENYING APPELLANT'S CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL."

At trial the court admitted into evidence photographs of the victim taken at the coroner's office. These photographs were submitted by the prosecutor and identified by the County Coroner. Appellant argues in this assignment of error that the trial court abused its discretion in allowing the admission of one of these photographs, State's Exhibit 1-A. Appellant claims the photograph was inadmissible since its probative value was far outweighed by its prejudicial impact. The photograph depicted the victim's body as it was recovered. The photograph showed that the victim had on a pinkish red shirt, which was partially pulled up revealing part of her abdomen and was off one of her shoulders exposing one of her breasts. The photograph showed that the victim had on a pair of jeans which had

been pulled down beneath her knees. The victim's underpants were also partially pulled down. The photograph also revealed the decomposed state of the victim's body.

"In accordance with Evid. R. 403 and 611(A) the admission of photographic evidence is committed to the sound discretion of the trial court."[1] State v. Stanton (Mar. 24, 1988), Cuy. App. No. 53602, unreported. In State v. Maurer (1984), 15 Ohio St. 3d 239, the court held:

> "However, the mere fact that a photograph is gruesome or horrendous is not sufficient to render it per se inadmissible. [Citations omitted.] 'The trial court has broad discretion in the admission ... of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere.'" (Emphasis added.)

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[1] Evid. R. 403 states as follows:

"(A) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

"(B) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

Evid. R. 611(A) states as follows:

"(A) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

The trial court did not abuse its discretion in allowing this particular photograph to be admitted into evidence. Further, the appellant has failed to demonstrate how he was materially prejudiced by the admission of this photograph. The mere fact that a photograph is gruesome or horrendous does not in and of itself render it inadmissible if the trial court, in its discretion, determines it to be useful. State v. Woodards (1966), 6 Ohio St. 2d 14.

This photograph revealed the victim to be partially disrobed. In United States v. Kilbourne (C.A. April, 1977), 559 F. 2d 1263, "An appellant's conviction for murder was affirmed when the court held that evidence of sexual relations with the victim was relevant to show motive and that the probative value was not substantially outweighed by the danger of prejudice." Cited with approval in Maurer, supra. We find that the photograph taken of the state of the victim's body when recovered and brought to the coroner's officer was illustrative of the appellant's intent to harm the victim. We admit that the state of the body's decomposition was gruesome, however, we cannot say that the picture's probative value was outweighed by this effect.

Additionally, we also point out that the present case was tried to a three judge panel. The concern that a jury was improperly persuaded by a gruesome photograph is not present. The trier of fact in this case can be presumed to have afforded the proper evidentiary weight to this photograph.

The trial court acted within the bounds of its discretion in allowing state's Exhibit 1-A to be admitted into evidence. We find no abuse of discretion.

Appellant's sixth assignment of error is without merit.

VI.

Appellant's seventh assignment of error is:

> "THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH BY 1) NOT CONSIDERING ALL THE MITIGATING FACTORS; 2) CONSIDERING NON-STATUTORY AGGRAVATING FACTORS; AND 3) FAILING TO STATE ITS REASONS, IN VIOLATION OF OHIO REVISED CODE SECTION 2929.03(F), THEREBY VIOLATING APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS."

Appellant makes multiple arguments under this assignment of error. Appellant first argues that the trial court considered as aggravated circumstances factors which are not listed under R.C. 2929.04(A). The appellant also argues that the court failed to state its reasons as to why the aggravated circumstances outweighed any mitigating factors, and that the court failed to state how it considered the factors of mitigation. Finally, the appellant argues that the court failed to consider as evidence in mitigation testimony that the appellant would adapt well to a long prison term.

R.C. 2929.04(A)(7) provides:

> "(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to Section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
>
> ***
>
> "(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

The above statute details the aggravated circumstances which must be shown by the state in order for the death penalty to be imposed. In its opinion, the court stated that it had found the appellant guilty of the aggravated murder charge and the kidnapping specification which was attached to that charge.

R.C. 2929.03(F) provides in part:

> "The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of Section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.
>
> ***
>
> "The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed."

Under this statute, the trial court is required to state in its opinion the aggravated circumstances of which the defendant was convicted. Since the court stated in its opinion that the appellant was convicted of the kidnapping specification which was attached to the aggravated murder count of the indictment, the trial court complied with this R.C. 2929.03(F) requirement.

The appellant argues, however, that the court took into consideration as aggravating circumstances matters not listed in R.C. 2929.04(A), and that the court failed to give reasons why the aggravated circumstances outweighed the mitigating evidence adduced by the appellant.

In its opinion the court stated:

"WE FIND THE FOLLOWING REASONS WHY THE AGGRAVATING CIRCUMSTANCES THE OFFENDER WAS FOUND GUILTY OF COMMITTING WERE SUFFICIENT TO OUTWEIGH THE MITIGATING FACTORS."

"1. The Court finds beyond a reasonable doubt that the defendant was the principal offender in Count One of the Indictment.

"2. The methodical manner in which the defendant deprived the victim of her freedom. Examples:

"a. The violent struggle with the victim in a parking lot near Lakeview Avenue in Cleveland where the victim kept yelling for 'help.'

"b. The manner in which the defendant literally 'threw' the victim into his van.

"c. The manner in which the defendant literally 'threw' the five year-old son of the victim into the defendant's van.

"d. The continued pleas of the victim for help.

"e. The dialogue of the defendant to witnesses stating that the victim was drunk and not to interfere.

"f. The striking of the victim in the head with a silver object while driving along in the van.

"g. The victim bleeding profusely while in the van.

"h. The dragging of the victim out of the van and into a junkyard late in the evening.

"i. The finding of the coroner's office that the victim suffered ninety separate blows to the body.

"j. The partial disrobing of the victim.

"k. The stuffing of the victim into an empty barrel deep in the recesses of the junkyard."

In State v. Stumpf (1987), 32 Ohio St. 3d 95 the Court held that "[u]nder R.C. 2929.03(F), a trial court or three judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." Id., paragraph one of the syllabus. In this case, the pertinent sections of the trial court's opinion reflect that the court used the nature and circumstances of the appellant's offenses as its reasons why the aggravating circumstances of kidnapping outweighed the mitigating factors presented by the appellant. The court did not utilize the nature and circumstances of the appellant's crime as an aggravating circumstance, and the court did indeed give reasons as to why the aggravating circumstances outweighed the mitigating factors. Accordingly, these arguments of the appellant are without merit.

In regard to the appellant's argument that the trial court did not state how it considered the factors of mitigation, R.C. 2929.03(D)(3) requires a trial court to determine whether the aggravated circumstances of a capital defendant's crime outweigh any factors in mitigation. As has been mentioned, R.C. 2929.03(F) requires the trial court to state in its opinion whether the aggravating circumstances outweigh the mitigating factors. These revised code sections make it clear that the manner in which a trial court must consider the mitigating

factors is by weighing them against the aggravated circumstances. In this case, the court at the end of its opinion wrote "[t]his Court finds that in giving full and fair consideration to all the evidence, the aggravating circumstances clearly outweigh any mitigating factors offered by the defendant, beyond a reasonable doubt." Consequently, the court did state in its opinion how it considered the factors of mitigation, and appellant's argument in this regard is not well taken.

Lastly, the appellant argues under this assignment of error that the court failed in its opinion to consider as evidence of mitigation the testimony that the appellant would adapt well to a long prison term. It is established constitutional law that evidence that a defendant will not pose a danger if spared must be considered as potentially mitigating and that such evidence may not be excluded from the sentencer's consideration. Skipper v. South Carolina (1986), _____ U.S. _____, 106 S. Ct. 1669. At the mitigation phase of the appellant's trial, he put on the testimony of James R. Eisenberg, a forensic psychologist who had interviewed and tested the appellant. Dr. Eisenberg indicated that the appellant needed a structured setting with some sort of paternal figure, and that it was his opinion that the appellant would adapt quite well to a long prison sentence. The appellant argues that there is no indication in the trial court's sentencing opinion that the court considered this evidence.

R.C. 2929.04(B) lists the factors that a court must consider as mitigating. This Revised Code Section provides:

"(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in that indictment or count in the indictment and proved beyond a reasonable doubt, *** the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudi cations;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

"(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

"The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing."

In its opinion the court discussed the mitigating factors pertinent to the appellant's case:

"A. EXISTENCE OF ANY MITIGATING FACTORS SET FORTH IN DIVISION B OF SECTION 2929.04.

"The Court has considered in accordance with Revised Code of Ohio, Section 2929.04 the following mitigating factors:

"1. The nature and circumstances of the offense.

"2. The history, character and background of the offender.

"We find that the defendant has established by a preponderance of the evidence the following mitigating factors:

"1. The youth of the offender -- age 22.

"2. The defendant lacked significant history of prior criminal convictions although he did have a delinquency adjudication.

"We further find that the defendant has not established by a preponderance of the evidence Mitigating Factors 1, 2, 3 and 6 as set forth in 2929.04(B).

"B. EXISTENCE OF ANY OTHER MITIGATING FACTORS.

"The defendant presented the following factors which the Court has considered.

"1. Evidence of character.

"2. Family relationships.

"3. Employment history.

"4. Emotional stability.

"5. Educational background and native intelligence.

"This Court further finds beyond a reasonable doubt that the defendant offered no sufficient proof

of any of the [other][2] factors enumerated in Subsection B of the Ohio Revised Code Section 2929.04."

As the above shows, the court concluded that the appellant had failed to submit sufficient proof of any of the other factors enumerated in R.C. 2929.04(B). Since 2929.04(B)(7) provides that a court may consider factors not explicitly noted in the rest of R.C. 2929.04(B), it follows that the court in fact held that the appellant did not sufficiently prove that he would adapt well to future prison life.

In State v. Steffen (19820, 31 Ohio St. 3d 111, the Court held:

"While R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." Id., paragraph two of the syllabus.

---

2 The court actually wrote "[t]his court *** finds *** that the defendant offered no sufficient proof on any of the factors enumerated in Subsection B of the Ohio Revised Code." However, in the paragraphs immediately preceding this sentence, the court found that the appellant had proven some of the mitigating factors in R.C. 2929.04(B), but had not proven other factors specifically listed in that statute. In addition, the sentence of issue was placed under the heading "EXISTENCE OF ANY OTHER MITIGATING FACTORS." In light of these facts, the only possible explanation for the apparent inconsistency in the court's opinion is that the court mistakenly left out the word "other" in the sentence at issue.

Because of this precedent and because the credibility of the witnesses is an issue primarily for the trial court, DeHass, supra, the court in this case was free to reject the testimony of the appellant's expert and determine that the appellant had not sufficiently proven that he would be a good prisoner. Accordingly, the court was not required to consider that evidence as a mitigating factor, and this argument of the appellant is meritless.

Appellant's seventh assignment of error is overruled.

VII.

Appellant's tenth assignment of error is:

> "THE TRIAL COURT ERRED BY CONVICTING APPELLANT OF A SPECIFICATION WHICH DUPLICATED AN ELEMENT OF THE PRINCIPLE OFFENSE AND THEREBY DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS OF LAW AND AGAINST CRUEL AND UNUSUAL PUNISHMENT."

The appellant was charged with the aggravated murder of Ruby Stapleton in violation of R.C. 2903.01(B). This Revised Code Section provides that:

> "No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape."

As has been discussed, attached to the appellant's aggravated murder charge was a penalty enhancement specification which charged that the appellant had committed aggravated murder while committing kidnapping. R.C. 2929.04(7) requires that a capital defendant be convicted of such a specification in order for the

death sentence to be imposed on him. Appellant claims under this assignment of error that the specification duplicated the substance of the aggravated murder charge. Appellant argues that the specification failed to narrow the class of persons subject to the death penalty as required by Zant v. Stephens (1983), 446 U.S. 862. Appellant, therefore, asserts that his right to due process of law was violated, and that the death sentence imposed on him constituted cruel and unusual punishment.

In State v. Poindexter (1988), 36 Ohio St. 3d 1, the Court recently held that:

> "When issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case." Id., the syllabus.

Appellant's argument under this assignment of error has been asserted and rejected by the Ohio Supreme Court in numerous instances. State v. Jenkins (1984), 15 Ohio St. 3d 164, 177-178; State v. Buell (1986), 22 Ohio St. 3d 124, 141-142; State v. Barnes (1986), 25 Ohio St. 3d 203, 206-207; State v. Steffen (1987), 31 Ohio St. 3d 111, 114; State v. Poindexter (1988), 36 Ohio St. 3d 3d 1, 4. Pursuant to this authority, appellant's argument is not well taken. Appellant's assignment of error is overruled.

VIII.

Appellant's eleventh assignment of error is:

> "IMPOSITION OF THE DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION."

Under this assignment of error the appellant makes a multitude of arguments under subheadings A through J as to why Ohio's capital sentencing statutes are unconstitutional. Almost all of these arguments have been previously rejected by the Ohio Supreme Court. Pursuant to Poindexter, supra, we may summarily reject these arguments. Set forth below we list each of the appellant's constitutional arguments and the precedents which reject those arguments.

Under his subheading A, the appellant argues that his death sentence violates his due process rights because it is not the least restrictive means toward the furtherance of a compelling government interest. This argument was rejected in State v. Jenkins (1984), 15 Ohio St. 3d 164, 168; and State v. Stumpf (1987), 32 Ohio St. 3d 95, 103. Therefore, it is without merit.

Under subheading B, appellant argues that R.C. 2929.02, 2929.03, and 2929.04 violate his rights to effective assistance of counsel and to a trial before an impartial jury because the bifurcation of the guilt and sentencing phases of the case causes defense counsel to lose credibility with the jury. This argument was rejected in Jenkins, 15 Ohio St. 3d 187-188; State v. Mapes (1986), Ohio St. 3d 108, 117-118; and State v. Zvern (1987), 32 Ohio St. 3d 56, 63. Accordingly, it is without merit.

Under subheading C, appellant argues that R.C. 2929.03, 2929.04 and 2929.05 are unconstitutional because they do not provide the jury with adequate guidelines during its sentencing deliberation. This argument was rejected in Jenkins, 15 Ohio

St. 3d at 172-173; State v. Steffen (1987), 31 Ohio St. 3d 111, 125; and State v. Bueke (1988), 38 Ohio St. 3d 29, 40. Therefore, this argument is not well taken.

Under subheading D, the appellant claims that R.C. 2929.02, 2929.04 and Crim. R. 11(C)(3) unconstitutionally encourage defendants to plead guilty to avoid the death penalty. This argument has been rejected in numerous cases including State v. Buell (1986), 22 Ohio St. 3d 124, 138; Steffen, 31 Ohio St. 3d at 103; and most recently State v. Bedford (1988), 39 Ohio St. 3d 122, 132.

Under subheading E, the appellant asserts that R.C. 2929.03 is unconstitutional because it fails to require a jury to identify the mitigating factors found to exist when it recommends a life sentence and why those factors outweigh the mitigating circumstances. This argument was rejected in Jenkins, 15 Ohio St. 3d at 174-177. Consequently, it is meritless.

Under subheading F, the appellant claims that R.C. 2929.05 is unconstitutional because it does not explicitly require the appellate court to determine whether a defendant's death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor. This argument was rejected in State v. Scott (1986), 26 Ohio St. 3d 92, 109, and is not well taken.

Under subheading G, appellant claims that Ohio's capital sentencing statutes are unconstitutional because they do not allow a jury to show mercy when the aggravating circumstances outweigh the mitigating factors. This argument has been rejected in

numerous decisions including Jenkins, 15 Ohio St. 3d at 178; Steffen, 31 Ohio St. 3d at 125; and Bedford, 39 Ohio St. 3d at 132. It is, consequently, not well taken.

Under subheading H, the appellant argues that Ohio's capital sentencing scheme is unconstitutional because it permits a less than adequate showing of culpability by failing to require a conscious desire to kill, premeditation, or deliberation as the culpable mental state. This argument was rejected in Jenkins, 15 Ohio St. 3d at 170-171; and Scott, 26 Ohio St. 3d at 109. It is, therefore, without merit.

Under subheading I, the appellant claims that Ohio's capital sentencing statutes are unconstitutional because they do not require proof beyond all doubt in order to sentence a defendant to death. This argument was rejected in Jenkins, 15 Ohio St. 3d 164, paragraph eight of the syllabus; and State v. Maurer (1984), 15 Ohio St. 3d 237, paragraph six of the syllabus. Therefore, this argument is without merit.

Under subheading J, the appellant claims that R.C. 2929.05(A) is unconstitutional because in making their proportionality review, courts only have to examine other cases in which the defendant's were sentenced to death. This argument has been rejected in a multitude of cases including Jenkins, 15 Ohio St. 3d at 209; Steffen, 31 Ohio St. 3d at 123-124; and Bedford, 39 Ohio St. 3d at 131. Hence, this argument is meritless.

Appellant's eleventh assignment of error is overruled.

IX.

Appellant's eighth and ninth assignments of error raise interrelated issues, and therefore, will be discussed together. These assignments of error are:

> "THE AGGRAVATING CIRCUMSTANCE OF WHICH APPELLANT WAS CONVICTED DOES NOT OUTWEIGH THE MITIGATING FACTORS.
>
> "APPELLANT'S SENTENCE OF DEATH IS EXCESSIVE AND DISPROPORTIONATE TO SIMILAR CASES AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW."

Under his eighth assignment of error, the appellant argues that the trial court erred in determining that the aggravating circumstances of the appellant's crime outweighed any factors pertinent to mitigating his sentence. Under his ninth assignment of error, the appellant argues that his death sentence was disproportionate to the sentences imposed in similar cases, and therefore, constitutes cruel and unusual punishment. R.C. 2992.05 requires an appellate court to independently review any death sentence imposed on a defendant. In reviewing a death sentence, we must independently make determinations as to both of the issues raised by the appellant under these assignments of error. In light of this fact, we will perform our entire R.C. 2929.05 review under the appellant's eighth and ninth assignments of error.

R.C. 2929.05 provides in part:

> "The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence

disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravated circumstances the offender was found guilty of committing, and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."

As the above illustrates, a reviewing court must make five determinations in order to uphold the imposition of a death sentence. If any one of these determinations cannot be made, then the death sentence must be vacated.

The first determination that must be made is whether the evidence supports the findings by the trial court that the defendant was guilty of aggravated circumstances. The aggravated circumstances that must exist in order to uphold a death sentence are located in R.C. 2929.04. The appellant was charged and convicted of the aggravated circumstance listed in R.C. 2929.04(A)(5). The statute provides in pertinent part:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to Section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"***

"(7) The offense was committed while the offender was committing, *** or fleeing, immediately after committing *** kidnapping *** and the offender was the primary offender in the commission of the aggravated murder ***."

As has been stated, four eyewitnesses testified that they saw a man force the victim, Ruby Stapleton, into a van. Three of these witnesses both identified the appellant as the victim's assailant and the appellant's van as the one used in the kidnapping. Devon Stapleton testified that the appellant forced he and his mother into the van. Further, blood found in the appellant's van was determined to be that of Ruby Stapleton, and a footprint found on the van's windshield was determined to be from a shoe found on Ruby's body. This evidence overwhelmingly supported the trial court's finding that the appellant was guilty of the aggravated circumstance of kidnapping.

The second determination that must be made is whether the aggravating circumstance of which the defendant was found guilty outweighs the mitigating factors that were shown to exist.

At the mitigation phase of the appellant's trial, the appellant's mother, Dora Elizabeth Jells Michael, testified that the appellant had been a small quiet child who was loving and obedient. She stated that the appellant had always liked work and had done any kind of job he could get. She also stated that the appellant was twenty-one years old at the time of trial.

The appellant's uncle, Barabary Lee Jones, testified that the appellant had lived with him from the time the appellant was

two to the time he was fourteen. Jones testified that the appellant did not drink, smoke, or use drugs. He testified that the appellant had moved to Cleveland about three years prior to trial, and that the appellant had worked for him for about one and a half years after the appellant moved to Cleveland.

The appellant's grandmother, Anna Bea Jones, testified that the appellant had been an obedient child and that he always had lots of jobs.

The appellant made an unsworn statement pursuant to R.C. 2929.03(D)(1). In this statement, the appellant gave the court a synopsis of his life history. He told the court that he was twenty-one years old, and that his only other experience with the law was a prior delinquency adjudication for a purse snatching when he was sixteen. The appellant also stated that he received his G.E.D. while in the custody of the State of Pennsylvania, and that he had been employed at several different jobs from the time he left his uncle's employment to the time of his arrest.

Dr. James R. Eisenberg, a clinical and forensic psychologist testified that he had examined and tested the appellant. Eisenberg stated that the appellant's I.Q. was lower than ninety-five percent of the population. He also testified that the appellant had a dependency for authority, and that the appellant would adapt quite well to a long term prison sentence.

As has been mentioned, the nature and circumstances of a capital defendant's crime may be utilized as reasons why the

aggravating circumstances of that murder outweigh any mitigating factors. Stumpf, supra. The nature and circumstances of the kidnapping and murder in this case are so heinous and despicable that the aggravated circumstance of kidnapping overwhelmingly outweighs all of the testimony adduced by the appellant in mitigation. Accordingly, the appellant's argument in this regard is not well taken.

The third determination that must be made is whether the trial court properly weighed the aggravated circumstance of which the defendant was convicted and the mitigating factors in the case. The trial court determined that the aggravated circumstance of the defendant's conviction outweighed the mitigating factors in the case. Since we have also reached this conclusion above, it follows that the trial court properly weighed these factors when it considered them. Accordingly, we determine that the trial court properly weighed these factors.

The fourth determination that must be made is whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. In discussing this determination, the Ohio Supreme Court has stated:

> "The proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." State v. Steffen (1987), 31 Ohio St. 3d 111, syllabus.

Pursuant to the above, cases involving the imposition of capital punishment reviewed by this court must now be addressed.

In State v. Buell (April 11, 1985), Cuyahoga App. No. 48621, unreported, affirmed 22 Ohio St. 3d 124, we affirmed the death sentence imposed on a defendant who had kidnapped, raped, and strangled to death an eleven year old girl. In State v. Apanovitch (September 8, 1986), Cuyahoga App. No. 49772, unreported, affirmed 33 Ohio St. 3d 19, we affirmed a death sentence imposed on a defendant who had raped, stabbed and bludgeoned to death a woman in her home. In State v. Morales (October 2, 1986), Cuyahoga App. No. 51566, unreported, affirmed 32 Ohio St. 3d 352, we affirmed the death sentence of a defendant who had beaten to death a twelve year old boy to get revenge on the victim's brother. In State v. Broom (July 23, 1987), Cuyahoga App. No. 51237, unreported, affirmed 40 Ohio St. 3d 277, we affirmed the death sentence imposed on a defendant who had kidnapped, raped, and stabbed to death a fourteen year old girl. In State v. Heinish (September 8, 1988), Cuyahoga App. 54427, unreported, we affirmed the death sentence imposed on a defendant who had attempted to rape his stepdaughter and then bludgeoned or burned her to death.

In the instant case, the appellant kidnapped and bludgeoned to death Ruby Stapleton in the presence of her five year old child. We find this murder to be no less heinous or despicable than those we have reviewed above.

Accordingly, it is our determination that the death penalty imposed on the defendant is proportional to the sentences imposed in similar cases.

The fifth determination that must be made is whether the sentence of death is appropriate in this case. Upon consideration of the record and all the above conclusions, we determine that the sentence of death imposed on the defendant is appropriate in this case.

Finally, since all five R.C. 2929.05 determinations have been made by us, the appellant's eighth and ninth assignments of error are overruled.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JOHN V. CORRIGAN, P.J., and

J.F. CORRIGAN, J., CONCUR

JOURNALIZED MAY - 1 1989

GERALD E. FUERST, Clerk of Courts

By [illegible] Deputy

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GERALD E. FUERST, CLERK

BY [illegible] DEP.

JUDGE

ANN DYKE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

VOL 253 PG 994

ALL PARTIES — COSTS TAXED.

CASE NO. 217570

THE STATE OF OHIO v. REGINALD JELLS

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CRIMINAL BRANCH

DEFENDANT MAY WAIVE JURY TRIAL

I, REGINALD JELLS, the defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by Three judges of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by jury.

X [signature]
(Signature)

WITNESS:

[signature]
Regis E. McGann

CCP/C30/#8

STATE OF OHIO, } ss
CUYAHOGA COUNTY

STATE OF OHIO — Plaintiff

vs.

Reginald Jells — Defendant

IN THE COURT OF COMMON PLEAS

September Term, 19 87

To-wit: September 18, 1987 19

No. CR 217570

INDICTMENT Aggravated Murder, w/cts.
Kidnapping, w/ct. Same, w/cts.
Aggravated Robbery

Nov 6 12 50 PM '87

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JOURNAL ENTRY

The defendant herein having, on a former day of court, having waived a Jury trial, defendant was found guilty by a three judge panel consisting of Judge Richard J. McMonagle, Judge Francis E. Sweeney and Judge Thomas O. Matia, of Aggravated Murder, RC 2903.01, w/felony specification, count one (1): Kidnapping, rc 2905.01, as charged in counts two (2) and three (3) and Judgement of Acquittal pursuant to criminal rule 29 was granted as to count four (4) and as to the aggravated robbery specification on count one (1), was this day in open court with his counsel present.

Thereupon, the court inquired of defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

It is ordered and adjudged that defendant, Reginald Jells be imprisoned and confined in the Chillicothe Correctional Institution, Chillicothe, Ohio and then be transported to the Southern Ohio Correctional Facility, Lucasville, Ohio and on September 16, 1988 the sentence of DEATH in manner prescribed by law be carried into effect, to-wit: Aggravated Murder, RC 2903.01, with specification, as charged in count one (1) and that defendant is further sentenced to serve from five (5) years to twenty-five (25) years on each of counts two (2) and three (3) and that said counts two (2) and three (3) be served concurrently with each other.

Defendant is fully advised of his right to appeal. Defendant declared indigent. The court appoints attorny Richard Hubbard of the Public Defender's Office and attorney Regis McGann to represent defendant for appeal purposes.

JUDGE: Richard J. McMonagle

JUDGE: Francis E. Sweeney

THE STATE OF OHIO, Cuyahoga County } SS
I GERALD E. FUERST CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Journal
NOW ON FILE IN MY OFFICE
WITNESS MY HAND AND SEAL OF SAID COURT THIS 21 DAY OF Oct A.D. 198 7
GERALD E. FUERST, Clerk
By Victoria A Kelley Deputy

Thomas O. Matia, Judge
n 9/30/87 bac 9/29

Thomas O. Matia

STATE OF OHIO :
: SS:
CUYAHOGA COUNTY :

FILED IN THE COURT OF COMMON PLEAS
Oct 6 1 51 PM '87
CASE NUMBER CR-217570
GERALD E. FUERST
CLERK
CUYAHOGA COUNTY, OHIO

RECEIVED FOR FILING
OCT 6 1987
GERALD E. FUERST, CLERK
BY ____ DEP.

THE STATE OF OHIO :
Plaintiff :
vs : OPINION
REGINALD JELLS :
Defendant :

THOMAS O. MATIA, J.
RICHARD J. McMONAGLE, J.
FRANCIS E. SWEENEY, J.

This Opinion is rendered pursuant to Ohio Revised Code §2929.03(F). The Cuyahoga County Grand Jury returned Indictments for Aggravated Murder, §2903.01 with Felony Murder Specifications with Two Counts of Kidnapping, §2905.01 and Aggravated Robbery, §2911.01. All the Indictments stem from an incident which occurred during the evening hours of April 28, 1987, wherein Ruby Stapleton was kidnapped and subsequently brutally beaten to death by the defendant, receiving at least ninety blows to the body and then dragged into a junkyard and was then partially disrobed. After the murder, the defendant left Ruby Stapleton's five year-old son, Devon, alone in an unsafe place, after midnight.

The defendant, after pleas of Not Guilty to all of the charges at his arraignment of the case, was tried by a three-judge panel at a trial which commenced on the 24th day of August, 1987. On the 31st of August the Court found the defendant Guilty of all counts to include the Aggravated Murder count which contained the Kidnapping Specification and the Court dismissed the

PG 755 PG 122

THE STATE OF OHIO, Cuyahoga County } SS
I GERALD E. FUERST CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Journal
NOW ON FILE IN MY OFFICE
WITNESS MY HAND AND SEAL OF SAID COURT THIS 21 DAY OF Oct A.D. 198 7
GERALD E. FUERST, Clerk
By Victoria A Kelley Deputy

Nov 6 12 51 PM '87

Aggravated Robbery count of the Indictment. Pursuant to R.C. 2929.04(B), a mitigation hearing was held on September 17, 1987. At the mitigation hearing the defendant was afforded an opportunity to present evidence and was given great latitude in the presentation of evidence of the factors in mitigation of the imposition of the sentence of death. The defendant made an unsworn statement and presented several witnesses, friends and family to testify about the defendant. The three-judge panel found on September 18, 1987, that the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. This Court now is addressing in this separate opinion its specific findings as to the existence of the mitigating factors set forth in Division (B) of §2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reason why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

WE FIND THE FOLLOWING REASONS WHY THE AGGRAVATING CIRCUMSTANCES THE OFFENDER WAS FOUND GUILTY OF COMMITTING WERE SUFFICIENT TO OUTWEIGH THE MITIGATING FACTORS.

1. The Court finds beyond a reasonable doubt that the defendant was the principal offender in Count One of the Indictment.

2. The methodical manner in which the defendant deprived the victim of her freedom. Examples:

a. The violent struggle with the victim in a parking lot near Lakeview Avenue in Cleveland where the victim kept yelling for "help."

Nov 6 12 51 PM '87

b. The manner in which the defendant literally "threw" the victim into his van.

c. The manner in which the defendant literally "threw" the five year-old son of the victim into the defendant's van.

d. The continued pleas of the victim for help.

e. The dialogue of the defendant to witnesses stating that the victim was drunk and not to interfere.

f. The striking of the victim in the head with a silver object while driving along in the van.

g. The victim bleeding profusely while in the van.

h. The dragging of the victim out of the van and into a junkyard late in the evening.

i. The finding of the coroner's office that the victim suffered ninety separate blows to the body.

j. The partial disrobing of the victim.

k. The stuffing of the victim into an empty barrel deep in the recesses of the junkyard.

A. EXISTENCE OF ANY MITIGATING FACTORS SET FORTH IN DIVISION B OF SECTION 2929.04.

The Court has considered in accordance with Revised Code of Ohio, Section 2929.04 the following mitigating factors:

1. The nature and circumstances of the offense.

2. The history, character and background of the offender.

We find that the defendant has established by a preponderance of the evidence the following mitigating factors:

1. The youth of the offender--age 22.

2. The defendant lacked significant history of prior criminal convictions although he did have a delinquency adjudication.

We further find that the defendant has not established by a preponderance of the evidence Mitigating Factors 1, 2, 3 and 6 as set forth in 2929.04 B.

B. EXISTENCE OF ANY OTHER MITIGATING FACTORS.

The defendant presented the following factors which the Court has considered.

1. Evidence of character.

2. Family relationships.

3. Employment history.

4. Emotional stability.

5. Educational background and native intelligence.

This Court further finds beyond a reasonable doubt that the defendant offered no sufficient proof of any of the factors enumerated in Subsection B of the Ohio Revised Code §2929.04. This Court finds that in giving full and fair consideration to all the evidence, the aggravating circumstances clearly outweigh any mitigating factors offered by the defendant, beyond a reasonable doubt.

Based upon all of the foregoing, the Court finds that the aggravating circumstances of which the defendant was convicted, were sufficient to outweigh

whatever existed of allegedly mitigating factors presented in this case. Accordingly, this three-judge panel sentenced the defendant, Reginald Sells, to death. This pronouncement was made on September 18, 1987.

THOMAS O. MATIA, JUDGE

RICHARD J. McMONAGLE, JUDGE

FRANCIS E. SWEENEY, JUDGE

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

IV § 2 Supreme court

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

§ 2905.01 Kidnapping.

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against his will;

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances which create a substantial risk of serious physical harm to the victim:

(1) Remove another from the place where he is found;

(2) Restrain another of his liberty;

(3) Hold another in a condition of involuntary servitude.

(C) Whoever violates this section is guilty of kidnapping, an aggravated felony of the first degree. If the offender releases the victim in a safe place unharmed, kidnapping is an aggravated felony of the second degree.

ROBBERY

§ 2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, an aggravated felony of the first degree.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to divi-

sion (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

[TRIAL BY COURT]

§ 2945.05 Defendant may waive jury trial.
(GC § 13442-4)

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I . . ., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

HISTORY: GC § 13442-4; 113 v 123(179), ch 21, § 4; Bureau of Code Revision, Eff 10-1-53.

RULE 23. TRIAL BY JURY OR BY THE COURT

(A) **Trial by Jury.** In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.

(B) **Number of Jurors**

In felony cases juries shall consist of twelve.

In misdemeanor cases juries shall consist of eight.

If a defendant is charged with a felony and with a misdemeanor or, if a felony and a misdemeanor involving different defendants are joined for trial, the jury shall consist of twelve.

(C) **Trial Without a Jury.** In a case tried without a jury the court shall make a general finding.

RULE 18.1 TRIAL BY JURY

a. **By Jury.** The number of jurors required to try a case and render a verdict shall be as provided by law.

b. **Waiver.** The defendant may waive his right to trial by jury with consent of the prosecution and the court.

(1) *Voluntariness.* Before accepting a waiver the court shall address the defendant personally, advise him of his right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent.

(2) *Form of Waiver.* A waiver of jury trial under this rule shall be made in writing or in open court on the record.

(3) *Withdrawal of Waiver.* With the permission of the court, the defendant may withdraw his waiver of jury trial but no withdrawal shall be permitted after the court begins taking evidence.

Amended May 7, 1975, effective Aug. 1, 1975.

RULE 23. TRIAL BY JURY OR BY THE COURT

(a) Trial by Jury.

(1) Every person accused of a felony has the right to be tried by a jury of twelve.

(2) In matters involving all misdemeanors, the accused is entitled to be tried by a jury of six.

(3) In matters involving class 1 and class 2 petty offenses, the accused has the right to be tried by a jury of three, if he:

(I) Files within ten days after arraignment or entry of a plea or written request for a trial by jury;

(II) Tenders to the court twenty-five dollars, unless such fee is waived by the judge because of the indigence of the defendant. If the charge is dismissed or the defendant is acquitted of the charge, or if the defendant, having paid jury fee, files with the court at least ten days before the scheduled trial date a written waiver of jury trial, the jury fee shall be returned to the defendant.

(4) The jury, in matters involving class 1 and class 2 petty offenses, shall consist of a greater number than three, not to exceed six, if requested by the defendant in his jury demand.

(5) Except as to class 1 felonies, the person accused of a felony or misdemeanor may waive a trial by jury by express written instrument filed of record, or by his announcement in open court appearing of record if the prosecuting attorney consents. Trial shall then be by the court.

(6) A defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court with the consent of the district attorney may permit withdrawal of the waiver prior to the commencement of the trial.

(7) In any case in which a jury of twelve has been sworn to try a case, and any juror by reason of illness or other cause becomes unable to continue until a verdict is reached, the court may excuse such juror. If no alternate juror is available to replace such juror, the parties, at any time before verdict, may stipulate in writing or on the record in open court, with approval of the court, that the jury shall consist of any number less than twelve, except in class 1 felonies, and the jurors thus remaining shall proceed to try the case and deliberate the issues unless discharged by the court for inability to reach a verdict.

(8) All jury verdicts must be unanimous.

[Amended effective January 1, 1984; January 1, 1989.]

MARYLAND RULE OF CRIMINAL PROCEDURE 735

Rule 735.

a. *Generally.*

A defendant having a right to trial by jury shall be tried by a jury unless the defendant waives the right pursuant to section b of this Rule. If the waiver by the defendant is accepted by the court, the State may not elect that the defendant be tried by a jury.

b. *Procedure for Acceptance of Waiver.*

A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until it determines, after an examination of the defendant on the record in open court by the court, by the State's Attorney, by the attorney for the defendant, or by any combination thereof, that the defendant knowingly and voluntarily waived a jury trial.

c. *Withdrawal of a Waiver.*

After a waiver of jury trial has been accepted, the court may not permit the defendant to withdraw the waiver except upon motion made prior to trial and for good cause shown. In determining whether to allow a withdrawal of the waiver, the court may consider the extent, if any, to which trial would be delayed by the withdrawal.
(Added Nov. 13, 1981, effective Jan. 1, 1982; amended Nov. 20, 1981, effective Jan. 1, 1982.)

NEVEDA REVISED STATUTE 175.011

175.011.

1. In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state. A defendant who pleads not guilty to the charge of a capital offense must be tried by jury.

2. In a justice's court, a case must be tried by jury only if the defendant so demands in writing not less than 30 days before trial. Except as otherwise provided in NRS 4.390 and 4.400, if a case is tried by jury, a reporter must be present who is a certified shorthand reporter and shall report the trial. (1967, p. 1424; 1983, p. 749; 1987, ch. 281, § 1, p. 614.)

RULE 1101. WAIVER OF JURY TRIAL

In all cases, the defendant may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to be tried by a judge without a jury. The judge shall ascertain from the defendant whether this is a knowing and intelligent waiver and such colloquy shall appear on the record. The waiver shall be in writing, made a part of the record, signed by the defendant, the judge, and the defendant's attorney as a witness.

Art. 1.14. Waiver of Rights

(a) The defendant in a criminal prosecution for any offense may waive any rights secured him by law except the right of trial by jury in a capital felony case.

(b) If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Article 28.01 of this code.

WASHINGTON REVISED STATUTE 10.01.060

10.01.060

" No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: *Provided however*, That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.

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8 East Long Street
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RANDALL M. DANA
State Public Defender

December 28, 1990

United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Attn: Joseph Spaniol, Clerk

Re: Reginald Jells v. State of Ohio

Dear Mr. Spaniol:

Please find enclosed the following original documents: Petition for Writ of Certiorari, Motion for Leave to Proceed In Forma Pauperis, Affidavit of Indigency, and Certificate of Service. Also enclosed are thirteen copies of the Petition for Writ of Certiorari. Please return one copy, time-stamped in the envelope provided.

Sincerely,

JoAnn Bour-Stokes
Chief Appellate Counsel,
Death Penalty Division

JBS/ts

Encls.

ORIGINAL

NO. 90-6713

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

REGINALD JELLS,

Petitioner

vs.

STATE OF OHIO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, Reginald Jells, murdered Ruby Stapleton on April 18, 1987. He was arrested April 26, 1987; indicted for Aggravated Murder with a felony murder specification (death penalty), two counts of Kidnapping and one count of Aggravated Robbery on May 5, 1987; and arraigned on May 8, 1987.

Trial commenced before a three-judge panel on August 24, 1987 and concluded on August 31, 1987. The panel found Petitioner guilty of Aggravated Murder with felony specification and two count of Kidnapping. The Aggravated Robbery court was dismissed

by the State on August 27, 1987. After a mitigation hearing (September 17, 1987) Petitioner was sentenced to death on September 18, 1987.

STATEMENT OF THE FACTS

On April 18, 1987, at about 10:30 p.m., Ruby Stapleton and her son, Devon Stapleton (age 5) were kidnapped off the streets of Cleveland, Ohio, at the intersection of Lakeview and Euclid Avenue.

The kidnapping was witnessed and testified to by Owen Banks (R. 127-160), Edward L. Wright (R. 161-194), Camillia Banks (R. 218-247), and Devon Stapleton. (R. 83-124) All four witnesses identified Petitioner as the perpetrator of the kidnapping. (R. 94, 132, 168-169, 225)

The kidnapping took place on a warm, clear night; in a well-lighted area; in the presence of numerous witnesses; and without any attempt by Petitioner to conceal his identity.

All four witnesses identified the victim as the woman the petitioner picked up and threw into the van. (R. 97, 132, 169, 229)

All four witnesses identified the van used by the petitioner during the kidnapping. (R. 84, 134, 165-166, 224)

Edward L. Wright also identified Devon Stapleton as the little boy the petitioner picked off the street and put in the van, and he recalled a partial license plate number of the van. (R. 167, 170-171)

Owen Banks also noted that the van had a sign on it saying

"Keep on Vannin". He mistakenly remembered it as "Keep on Truckin". (R. 146)

Camilla Banks recorded the actual license number of the van - 149 MJV. (R. 223) That license number was listed to the defendant. (R. 288) (The petitioner, upon arrest, admitted the van was his). (R. 287)

All the witnesses testified that the kidnapping was a deliberate and forceful act by the petitioner. The victim, Ruby Stapleton, was not visibly injured at the time of the kidnapping. No witnesses saw any blood on her face or any signs of wounds.

The testimony of Devon Stapleton indicates that sometime earlier he and his mother were either forced into the petitioner's van by Petitioner, or that they entered Petitioner's van voluntarily. (R. 84) At about 10:30 p.m., the victim, Ruby Stapleton, escaped from the van causing Petitioner to stop the van and physically force her and Devon back into the van. (R. 85) That was the incident witnessed by numerous citizens.

After Devon and his mother were kidnapped, Petitioner proceeded to bludgeon Ruby Stapleton with some metal object, which rendered her unconscious and probably killed her. (R. 86-88) During the bludgeoning, his mother's blood splattered on Devon's clothes. (R. 87). The petitioner then drove to a junkyard (R. 89) where he stopped the van (leaving Devon inside), took the body of Ruby Stapleton out by way of the driver's door (R. 90), and carried her into the junkyard, abandoning her.

It is not certain whether Ruby Stapleton died as a result of the bludgeoning that occurred while she was in the van, or

by further bludgeoning inflicting on her by Petitioner once they were in the junkyard. The condition of the body and its state of dress indicates that Petitioner committed or attempted some sexual act with the victim's body.

After depositing Ruby Stapleton's body in the junkyard, Petitioner returned to the van and drove to a gas station where he purchased some gas. He drove from the gas station to East 55th and Truscon, where he abandoned Devon Stapleton by forcing him out of the van. (R. 263) Devon was found at the above location by Clyde Smith at about 12:20 a.m., Easter Sunday, April 19th.

Mr. Smith, for some unknown reason, awoke in the middle of the night and decided to take a drive. Fortuitously, he came upon Devon Stapleton at the above location crying for his mother. Mr. Smith picked up Devon and took him to his home. He called the Cleveland Police to report finding Devon. He also learned the address and phone number of Devon's stepfather (Anthony Massengale) and phoned him regarding Devon. His wife (Anita Smith) then noticed a shiny substance on Devon's coat. Mr. Smith touched it and found it to be blood. (Devon's coat was not saved for evidence. It was turned over to family, whereupon it was washed). Devon told Mr. Smith that the blood was his mother's (R. 261); and that a man had thrown him out of a van. (R. 263) Mr. Smith re-phoned the Cleveland Police, notifying them of the blood on Devon's jacket. The police responded and took custody of Devon.

On April 26, 1987, at about 3:20 p.m., Cleveland Police Officer Patrick Gillissie and his partner arrested Petitioner, Reginald Jells, in the van he used to kidnap and murder Ruby

Stapleton. The arrest was based on the license number received from Camilla Banks. The van was confiscated for processing. After processing Petitioner's van, bloodstains found in the van were determined to be those of the victim, Ruby Stapleton. (R. 375-379)

On April 27, 1987, Cleveland Police Officer Verlin Peterson received information from his sister, Janice Abernathy (also a Cleveland Police Officer) concerning the disappearance of Ruby Stapleton. Officer Peterson recalled that he had found a woman's body in a certain junkyard before, in 1979.

On April 28, 1987, at about 5:30 p.m., Officer Peterson went to that same junkyard, at East 84th Street and Grand Avenue in Cleveland, Ohio, where he found the body of Ruby Stapleton. The body of Ruby Stapleton was partially clad, with her panties pulled down and still wearing the pink blouse the witnesses saw her wearing when she was kidnapped.

Found on the scene where the body was discovered was a piece of cardboard with a muddy shoeprint on it (State's Exhibit 6-A-1). (R. 310-312) The shoeprint on the cardboard was compared with Petitioner's right black tennis shoe.. The print on the cardboard was found to have been made by Petitioner's right black tennis shoe. (R. 357)

Additional processing of Petitioner's van revealed:

> Latent fingerprints were found in the van. Some of the prints belonged to Petitioner (R. 314, 316-318); the others could not be compared with those of Ruby Stapleton because of the advanced state of decomposition of her body. (R. 314-315)

> A transmission jack was found in Petitioner's van. (R. 318-319) The top of the transmission jack matched the marks found on the victim's body. (See State's Exhibits 3-X-1; 3-X-2; 3-X-3; 3-X-4; and 3-X-5).
>
> Petitioner's pants (State's Exhibit 9-A) and Petitioner's tennis shoes (State's Exhibit 9-C) were examined and were found to be stained with human blood. (R. 369-371)
>
> A tennis shoe print was found on the inside of the van's windshield. (R. 322-326) The shoeprint was compared with the victim's left tennis shoe and was found to have been made by the shoe. (R. 354-355)

Based on all of the above, Petitioner was tried by a three-judge panel and on August 31, 1987, was convicted of Aggravated Murder with a specification for kidnapping, the kidnapping of Ruby Stapleton and the kidnapping of Devon Stapleton. On September 18, 1987, after a sentencing hearing on the death penalty provision, the defendant was sentenced to death.

REASONS FOR DENYING THE WRIT

1. No Error is Committed Where the Record Shows a Defendant Knowingly, Intelligently and Voluntarily Waives his Right to a Jury Trial and Elects to be Tried by a Three-Judge Panel.

Petitioner's Proposition of Law No. I is the same as his Proposition of Law No. I filed with the Ohio Supreme Court.

Under Ohio law, a defendant charged with a capital offense has the choice of electing between a jury trial and a three-judge panel.

In this case, Petitioner was well-represented and counseled by two competent trial attorneys whose efforts are not challenged herein.

The record shows that Petitioner knowingly and intelligently waived his right to a jury, orally and in writing. Furthermore, Petitioner voluntarily elected to be tried by a three-judge panel.

The State of Ohio does not contest the law relevant to this issue. The State's position is that the facts in the trial record show that the petitioner knew and understood his right to a jury trial, that he voluntarily waived his right and elected to be tried by a three-judge panel. The recorded facts meet the legal requirements of a jury waiver.

The Ohio Supreme Court in State v. Jells (1990), 53 Ohio St. 3d 22, at 24-26, ruled:

> In his first proposition of law, appellant argues that his waiver of his right to trial by jury was constitutionally insufficient because the trial court did not conduct a more thorough inquiry to determine whether the waiver was intelligent, voluntary and knowing. See Crim. R. 23(A); R.C. 2945.05. We note initially that this proposition of law was not raised in the Court of Appeals and hence the plain error standard of review of Crim. R. 52(B) is applicable to our consideration. Plain error does not exist unless it can be said that but for the error, the outcome below would clearly have been otherwise. See State v. Long (1978), 53 Ohio St. 2d 91, 7 O.O. 3d 178, 372 N.E. 2d 804, paragraph two of the syllabus; State v. Greer (1988), 39 Ohio St. 3d 236, 252, 530 N.E. 2d 382, 401.
>
> Under R.C. 2929.03(C)(2)(a) and R.C. 2945.06 a defendant in a death penalty prosecution may waive his right to a trial by jury and have his case heard before a three-judge panel. R.C. 2945.05, the general statute concerning jury waivers, prescribes language that should be used in waiving a jury trial. In the case at bar, the waiver form signed by the appellant conformed to the language contained in R.C. 2945.05. Specifically, the form stated:

I, REGINALD JELLS, the defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by three judges of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by jury.

The statement was signed by appellant and two of his attorneys as witnesses.

Appellant asserts that the inquiry conducted by the court was inadequate to determine whether an intelligent, voluntary, and knowing waiver was made. Appellant points to the following colloquy:

THE COURT: Reginald, is that your signature?

THE DEFENDANT: Yes, it is, sir.

THE COURT: You did this of your own free will?

THE DEFENDANT: Yes, I did.

THE COURT: Nobody forced you to do this?

THE DEFENDANT: No, sir.

THE COURT: All right.

MR. HUBBARD [defense counsel]: I have witnessed his signature, your Honor.

THE COURT: This will be made part of the record.

Appellant cites this court's opinion in State v. Ruppert (1978), 54 Ohio St. 2d 263, 271, 8 O.O. 3d 232, 237, 375, N.E. 2d 1250, 1255, certiorari denied (1978), 439 U.S. 954, as authority for his position that the trial court in this case failed to determine whether his waiver was properly made. We find Ruppert not to be on point. In Ruppert the defendant was misinformed by the trial judge that if he waived a jury trial the three-judge panel would have to unanimously find him guilty when all that was required was a majority decision. The court held that since the defendant was misinformed his waiver was not intelligent, voluntary, and knowing. Id, at 272, 8 O.O. 3d at 237, 375 N.E. 2d at 1255-1256. Here, there is no allegation by the appellant that the trial court misinformed

him of his rights concerning the execution of the waiver form.

There is no requirement in Ohio for the trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel. See State v. Morris (1982), 8 Ohio App. 3d 12, 14, 8 OBR 13, 15-16, 455 N.E. 2d 1352, 1355. While it may be better practice for the trial judge to enumerate all the possible implications of a waiver of a jury, there is no error in failing to do so. Since the executed waiver in this case complied with all of the requirements of R.C. 2945.05, and counsel was present at the signing of the waiver, we find no error.

Accordingly, we find no error, plain or otherwise, and appellant's first proposition of law is not well-taken.

The State of Ohio asks that a Writ not be granted on this issue.

II. No Error Exists Where the Facts Show that Proper Line-Up and Photo Array Procedures were Followed, or that Independent Sources of Identification Enabled Witnesses to Identify the Defendant, Notwithstanding the Photo Array or Line-Up Procedure.

Petitioner's Proposition of Law No. II submitted in support of his reason for granting the Writ is a compilation of his Propositions of Law Nos. IV, V, and VI submitted to the Ohio Supreme Court.

A. Photo Array

The portion of the transcript that is relative to this issue is R. 400 to 411. At R. 464, the court overruled the

defense motion to suppress the identification of Petitioner as it relates to all witnesses.

The basis for the witnesses' ability to identify the petitioner is founded in the fact that they saw the petitioner as he committed various acts in their presence. They were not influenced by the photo arrays (Def. Ex. C and E) nor the lineup. Their ability to identify the petitioner was based solely on their independent recollection of the acts committed in their presence.

In Neil v. Biggers (1972), 409 U.S. 188, at 199, the U.S. Supreme Court suggested some factors to be considered regarding this issue:

> We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

It is obvious from Devon Stapleton's testimony (R. 83-123) that his in-court identification of the petitioner was based on his memory and recollection of seeing the petitioner murder his mother. Devon and the victim were in the petitioner's van for a period of time before the victim fled the van at the intersection of Euclid Avenue and Lakeview in Cleveland, Ohio. He described and identified the van used by the petitioner. (R. 84, 98, 99) He saw the petitioner grab his mother after she fled the van,

and put her back in the van. (R. 85) He watched the petitioner get into the van and drive away with his mother and him. (R. 86) He saw and described the metal object the petitioner used to bludgeon his mother to death. (R. 86-87) While his mother was being bludgeoned to death by the petitioner, Devon saw the blood on his mother and he saw the blood splatter on him. (R. 87-88) He observed that the petitioner knocked his mother unconscious. (R. 88) He recalled that the petitioner drove to a junkyard, took his mother out of the driver's door of the van, and carried her into the junkyard. (R. 89-90) He remembered that the petitioner came back from the junkyard, drove to a gas station, and later dropped Devon off on some street. (R. 91-92)

During these events, Devon Stapleton had an extended period of time within which to view the petitioner. The acts committed by the petitioner in his presence were of such a memorable nature that they had had his undivided attention. Devon's certainty of identification both in court (R. 94) and during the photo identification (R. 405-406) indicated that he was able to identify the petitioner because he saw the petitioner commit the acts he described. The nine day lapse between the crimes (April 18, 1987) and the photo identification (April 27, 1987) was not prejudicial, either to the petitioner or to Devon's ability to describe the petitioner (R. 406) and the events surrounding his mother's murder are corroborated by other eyewitnesses, scientific evidence, and physical evidence.

Owen Banks' testimony (R. 127-160) corroborates and adds credibility to the testimony of Devon Stapleton. He saw the

incident and described it the same as Devon Stapleton did (R. 128-131); and identified the petitioner (R. 132) as the man who abducted Devon and his mother. He told his daughter to write down the license number of the petitioner's van (R. 129), which she did. (R. 223) He ~~personal~~ly identified the petitioner's van. (R. 134) Mr. Banks not only saw the petitioner struggling with the victim (R. 129), he went up to the petitioner -- face-to-face -- (R. 133), and confronted him to the point that the petitioner tried to explain his conduct by suggesting the victim was just drunk. (R. 131)

Mr. Banks' in-court identification was based on his witnessing the petitioner abduct Devon and his mother. It was not tainted by the photo identification. He described the photo identification (R. 134) and noted that, although he was shown other photos, he recognized the petitioner "right off". (R. 134)

Both Devon's testimony and that of Owen Banks is further substantiated by Edward Wright. (R. 161-194) He observed the incident at Lakeview and Euclid, and identified the petitioner as being the man who abducted Devon Stapleton and his mother. (R. 168) He also identified the petitioner's van as the one used by the petitioner during the kidnapping. (R. 165)

Camilla Banks also identified the petitioner as having kidnapped Devon Stapleton and his mother. (R. 225)

The evidence is uncontroverted that all the witnesses had an unobstructed view of the petitioner and his conduct; that they all are certain their in-court identification based solely on their memory of watching the petitioner kidnap Devon Stapleton and his

mother; that the lighting was good; and the circumstances under which they viewed the petitioner, and their in-court testimony, were uninfluenced by any method of police investigative identification.

Based on the law relevant to this issue and the facts contained in the trial record, it is clear that the trial court did not err in overruling the defense motion to suppress the in-court identification of the petitioner by Devon Stapleton, Owen Banks, Camilla Banks and Edward Wright. The law enunciated in Neil v. Biggers, supra, as applied to these facts shows that each witness had an independent means of in-court identification of the petitioner and were not influenced by any investigative procedure.

In its opinion, the Ohio Supreme Court stated, State v. Jells (1990), 53 Ohio St. 3d 22, at 26-28:

> II
>
> In his fourth and sixth propositions of law, appellant contends that the photographic array shown to certain witnesses, for purposes of identification, was unduly suggestive and violated several of appellant's state and federal constitutional rights.
>
> A
>
> First, appellant begins by asserting that the admission of the testimony of five year-old Devon Stapleton was improper because he was unable to independently and truthfully relate facts and he was shown an unduly suggestive photographic array.
>
> Evid. R. 601 sets forth the standards for determining the competency of a child as follows:
>
> Every person is competent to be a witness except:

> (A) Those of unsound mind, and children under (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly* * *[.]

In State v. Boston (1989), 46 Ohio St. 3d 108, 114, 545 N.E. 2d 1220, 1228, this court, noted that "Evid. R. 801(A) contemplates that to be competent, a witness must be able to receive a just impression of the facts, be able to recollect those impressions, be capable of communicating those impressions to others, and must understand the obligation to be truthful."

Prior to Devon's testimony, the court held a competency hearing. During the voir dire, Devon testified that he knew that it was good to tell the truth and bad to tell a lie. Devon showed his ability to relate and recall facts by testifying about the circumstances of his mother's death. During his substantive testimony, Devon again proved he was able to testify by describing the facts surrounding the abduction, including the appellant's use of a van, the object used to hit his mother, the junkyard where his mother's body was discarded, and the events that took place after he was dropped off by appellant. Both the voir dire and the substantive testimony of Devon show that he was qualified to testify; therefore, the trial court did not abuse its discretion in allowing him to do so. See, e.g., State v. Adams (1980), 62 Ohio St. 2d 151, 157, 16 O.O. 3d 169, 173, 404 N.E. 2d 144, 149 ("[t]he term 'abuse of discretion' connotes more than an error of law or of judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable.")

B

Still within his fourth proposition of law, appellant alleges error with respect to the photographic array shown to Devon, in view of his age and impressionability. The array consisted of five photographs, four of other men, taken indoors, and one of appellant's taken outdoors. Appellant claims that the photograph of him was dark, and his features were nearly indistinguishable. Both Owen Banks and Devon Stapleton selected appellant's photograph from the array, and subsequently identified him in court.

In order to suppress identification testimony, there must be "* * *a very substantial likelihood of irreparable misidentification." Simmons v. United States (1968), 390 U.S. 377, 384; accord State v. Perryman (1976), 49 Ohio St. 2d 14, 3 O.O. 3d 8, 358 N.E. 2d 1040, vacated on other grounds (1978), 438 U.S. 911. In Neil v. Biggers (1972), 409 U.S. 188, 199-200, the United States Supreme Court set forth the following factors to be considered in examining an identification procedure and its impact.

> "* * *[W]hether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.* * *"

The focus under the "totality of the circumstances" approach is upon the reliability of the identification, not the identification procedures. State v. Lott (1990), 51 Ohio St. 3d 160, 175, 555 N.E. 2d 293, 308; Manson v. Brathwaite (1977), 432 U.S. 98, 114 ["* * *reliability is the linchpin in determining the admissibility of identification testimony* * *"] State v. Moody (1978), 55 Ohio St. 2d 64, 67, 9 O.O. 3d 71, 72, 377 N.E. 2d 1008, 1010 ("[a]lthough the identification procedure may have contained notable flaws, this factor does not per se, preclude the admissibility of the subsequent in-court identification.")

In applying the criteria set forth in Biggers it is clear to this court that there was sufficient independent opportunity for Devon to view the appellant. Specifically, Devon and the victim had been in the appellant's van for a period of time before they fled the van at the intersection of Euclid Avenue and Lakeview. Devon saw appellant grab his mother after she fled the van, and put her back into the van. Devon himself was picked off the sidewalk and put back into the van. He witnessed the

bludgeoning of the victim by the appellant. During these events, Devon had an extended period of time within which to view the appellant. Further, Devon indicated that he was able to identify the appellant because he saw appellant commit the acts he described. Although appellant claims there were some inconsistencies with Devon's testimony, we find upon review of the entire transcript that he gave a generally accurate eyewitness account. Devon's testimony was not necessarily inconsistent and certanly not indicative of an unreliable witness. See State v. Moody supra, at 69, 9 O.O. 3d at 74, 377 N.E. 2d at 1011 ("[a]lthough there was some evidence of discrepancies on the part of the complainant in her identification of the appellant as her assailant, these questionable areas in complainant's description were particularly for the jury to decide."). Therefore, we find no error with the photographic array shown to Devon.

C

In his sixth proposition of law, appellant again attacks the same photographic array with respect to the identification made by Owen Banks. For the same reasons that Devon's identification is reliable, Owen Banks' identification is also reliable. Banks saw the same incident and described it virtually the same as Devon. Furthermore, he identified the appellant as the man who abducted Devon and the victim. Banks not only saw appellant struggling with the victim, but also went up to the appellant and confronted him regarding appellant's treatement of the victim. Banks even commented that, although he was shown other photographs, he recognized the appellant "right off". Thus, under the totality of the circumstances, the identifications of the appellant by Devon Stapleton and Owen Banks were reliable. Consequently, regardless of the validity of the identification procedures used by the state, the identification testimony of these witnesses at trial was properly admitted.

Accordingly, appellant's fourth and sixth propositions of law are overruled.

B. Line-Up

This issue relates to the testimony of Edward L. Wright (R. 161-194), and a lineup viewed by him. (R. 386-398)

Neil v. Biggers (1972), 409 U.S. 188.

Mr. Wright, a security guard, saw the petitioner kidnap Devon Stapleton and his mother at the intersection of Lakeview and Euclid, Cleveland, Ohio. He saw, under good lighting conditions (R. 170), the victim screaming as she was being picked up by the petitioner and thrown into the van. (R. 163-164) He observed how the victim, Devon, and the petitioner were dressed. (R. 163, 165, 178) Mr. Wright identified the petitioner's van (R. 165) and the petitioner. (R. 168-169) Subsequently, Mr. Wright viewed a lineup and identified the petitioner. (R. 168)

Petitioner alleges that the lineup was suggestive because the petitioner was wearing a light blue jumpsuit and the others in the lineup had different civilian clothes.

That Mr. Wright was able to identify the petitioner based on his independent recollection of the petitioner's conduct, and uninfluenced by the police investigative lineup, is best shown by his testimony at R. 179, 180, 182, 183, 185, 186. Mr. Wright unequivocally displayed his ability to identify the petitioner based on his recollection of viewing the petitioner's conduct. He was so certain that the petitioner is the one who kidnapped Devon Stapleton and his mother that he identified him immediately in the lineup.

Based on the facts that showed Mr. Wright had an independent means of identifying the petitioner that was not influenced by any police investigative procedure, the court properly overruled the petitioner's motion to suppress the in-court identification.

The Ohio Supreme Court in State v. Jells, supra, at 30, ruled:

> Appellant in his fifth proposition of law alleges that the lineup shown to witness Edward Wright was unduly suggestive and inherently unreliable. Appellant bases this proposition on the fact that, while the other men in the lineup were wearing street clothes, appellant was wearing prison garb, i.e., a jumpsuit.
>
> In State v. Sheardon (1972), 31 Ohio St. 2d 20, 60 O.O. 2d 11, 285 N.E. 2d 335, paragraph two of the syllabus, this court held with respect to police lineups that:
>
> "The due process clause of the Fifth and Fourteenth Amendments forbids any pre- or post-indictment lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification * * *"

See, also, Kirby v. Illinois (1972), 406 U.S. 682. A reviewing court should examine the factors surrounding the actual eyewitness incident to determine whether the witness is susceptible to suggestion, which would lead to an irreparable, mistaken identification. See Neil v. Biggers, supra.

In the case sub judice, Wright was able to describe the clothes that Devon and the victim wore. Wright was able to recognize that appellant's hair in court was shorter than it had been at the scene of the kidnapping. In applying the Biggers factors (see discussion at II B, supra), we find that Wright had ample opportunity to independently observe and identify appellant. Furthermore, he unequivocally displayed his ability to identify the defendant based on his recollection of the defendant's conduct. Accordingly, this proposition of law is not well-taken.

Based on the foregoing facts and law, the State of Ohio respectfully requests that the Writ not be granted.

- CONCLUSION

The Ohio appellate and Supreme Courts have properly reviewed and ruled on both issues presented herein. Petitioner has failed to raise and substantiate any constitutional issue or issue of great public interest not already correctly ruled on by the Ohio Supreme Court.

Based on the preceding law and facts, and the rulings of the Ohio Supreme Court, the State of Ohio respectfully asks that the Petition for Writ of Certiorari be denied.

STEPHANIE TUBBS-JONES,
Prosecuting Attorney of
Cuyahoga County, Ohio

By Carmen M. Marino
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Assistant Prosecuting Attorney
Attorneys for Respondent
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

SERVICE

A copy of the foregoing Brief has been mailed this 16 day of January, 1991, to Joann Bour-Stokes, Ohio Public Defender Commission, 8 East Long Street - 11th Floor, Columbus, Ohio 43266-0587.

Carmen M. Marino
CARMEN M. MARINO
Assistant Prosecuting Attorney

NO. 90-6713

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

REGINALD JELLS,

Petitioner

vs.

STATE OF OHIO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

AFFIDAVIT OF FILING

I, GEORGE J. SADD, being first duly cautioned and sworn, depose and say that I am a member of the bar of this Court and otherwise competent to execute this affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the 16th day of January, 1991, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned matter. Such mailing was made within the time permitted by this Court for such a filing.

George J. Sadd

GEORGE J. SADD
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

SWORN to before me and subscribed in my presence this 16th day of January, 1991.

Mary Ann Roberts

NOTARY PUBLIC - Mary Ann Roberts
Recorded in Cuyahoga County
State of Ohio
My commission expires 1/12/95

SUPREME COURT OF THE UNITED STATES

REGINALD JELLS *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 90-6713. Decided February 19, 1991

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, dissenting.

The question in this case is whether petitioner's waiver of his right to a jury trial was knowing and voluntary when there is no evidence that petitioner was aware that his waiver also applied to his right to be sentenced by a jury that could not impose death by less than a unanimous vote and without the trial judge's independent agreement that death was the proper sentence. Because I believe that petitioner could not be understood to have made a "knowing" decision without such critical information, I would grant the petition for certiorari.

I

The jury plays a vital role in Ohio's capital sentencing scheme. Under the Ohio Rules of Criminal Procedure, a felony defendant who does not waive the right to a jury trial is tried before a twelve-person jury. See Ohio Rule Crim. Proc. 23(b) (1987). When the defendant is accused of a crime punishable by death, the same jury presides at both the guilt phase and the penalty phase. See *State* v. *Mapes*, 19 Ohio St. 3d 108, 116, 484 N. E. 2d 140, 147 (1985), cert. denied, 476 U. S. 1178 (1986); see also Ohio Rev. Code Ann. § 2929.03(C)(2)(b) (1987). Unless the jury unanimously finds beyond reasonable doubt that death is the proper sentence, the defendant must be sentenced to life imprisonment with parole eligibility after either twenty or thirty years imprisonment. See Ohio Rev. Code Ann. § 2929.03(D)(2) (1987); see also *State* v. *Jenkins*, 15 Ohio St. 3d 164, 200, 473 N. E. 2d 264, 297 (1984), cert. denied 472 U. S. 1032 (1985). Signifi-

cantly, even if the jury unanimously recommends the death penalty, the trial court also must independently find beyond reasonable doubt that death is the correct sentence before the defendant may be sentenced to death. See Ohio Rev. Code Ann. § 2929.03(D)(2)–(3) (1987); see also *State* v. *Jenkins*, *supra*, at 200–201, 473 N. E. 2d, at 297.

Petitioner was convicted of murder and sentenced to death in an Ohio state court. Because petitioner waived his right to a jury trial, a three-judge panel determined both his guilt and his sentence.[1] The form on which petitioner executed his waiver mirrored the language of Ohio Rev. Code Ann. § 2945.05 (1987):

> "'I, REGINALD JELLS, the defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by three judges of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by jury.'" 53 Ohio. St. 3d 22, 25, 559 N. E. 2d 464, 468 (1990).

Petitioner signed the statement, as did his two witnessing attorneys. *Ibid.* The trial court also conducted a hearing to determine whether petitioner signed the form voluntarily:

> "'THE COURT: Reginald, is that your signature?
> "'THE DEFENDANT: Yes, it is, sir.
> "'THE COURT: You did this of your own free will?
> "'THE DEFENDANT: Yes, I did.
> "'THE COURT: Nobody forced you to do this?
> "'THE DEFENDANT: No, sir.
> "'THE COURT: All right.
> "'MR. HUBBARD [defense counsel]: I have witnessed signature, your Honor.
> "'THE COURT: This will be made part of the record.'" *Ibid.*

[1] Under Ohio law, a defendant who is accused of a crime punishable by death and who waives his right to a jury trial is tried and sentenced by a three-judge panel. See Ohio Rev. Code Ann. §§ 2929.03(C)(2)(b), 2945.06 (1987). Ohio's capital sentencing statute does not contain any provision whereby a capital defendant can waive his right to a jury trial but nonetheless elect to be sentenced by a jury.

Petitioner maintains that his waiver was not constitutionally sufficient because at no point did the trial judge advise him that by waiving his jury trial right he also waived jury sentencing. The Ohio Supreme Court did not address the sufficiency of petitioner's waiver under federal constitutional standards even though it acknowledged that petitioner had claimed his waiver was "constitutionally insufficient." See *id.*, at 24, 559 N. E. 2d, at 467. The court did hold, however, that under Ohio law the trial court is not required to determine whether a defendant "is fully apprised of the right to a jury trial," *id.*, at 25–26, 559 N. E. 2d, at 468, and that Ohio law is "satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel," *id.*, at 26, 559 N. E. 2d, at 468. For these reasons, the court determined that the trial court's failure specifically to advise petitioner of the effect of his waiver on sentencing gave rise to "no error, plain or otherwise." *Ibid.*[2]

I cannot accept the Ohio court's conclusion. The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. While this right is subject to waiver, "we 'do not presume acquiescence in the loss of fundamental rights,'" *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) (citation omitted), and courts are therefore obliged to establish that any such waivers are made knowingly and voluntarily, *id.*, at 464–465. It is generally accepted that waivers of certain constitutional rights—such as a waiver through a guilty plea

[2] Because the Ohio Supreme Court did not "actually . . . rel[y]" on a procedural bar for disposing of petitioner's federal claim, see *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985), our jurisdiction is secure. Respondent does not contend that petitioner's federal claim is not properly before us.

of the right to trial or a waiver of the right to counsel—should be made in open court. See *e. g.*, *Brady* v. *United States*, 397 U. S. 772, 748 (1970) (right to trial); *Johnson* v. *Zerbst*, *supra*, at 465 (right to counsel). Because these rights are critical in protecting a defendant's life and liberty, trial courts must apprise the defendant of the "*relevant circumstances and likely consequences*," *Brady* v. *United States*, *supra*, at 748 (emphasis added), to determine whether the defendant's waiver is made freely and intelligently.

Some courts, believing that the Constitution does not compel an inquiry by the trial judge when a defendant purports to waive his right to a jury trial, have nevertheless recognized that "trial courts *should* conduct colloquies with the defendant . . . [and] make sure that [the] defendant knows what the right guarantees before waiving it." See *United States* v. *Cochran*, 770 F. 2d 850, 852 (CA9 1985) (citing cases). In my view, when a *capital* defendant's waiver of his jury trial right includes a waiver of his right to jury sentencing, this type of a searching inquiry by the trial judge into the knowing and voluntary nature of the waiver is not only sound practice but is constitutionally compelled.

The decision to waive the right to jury sentencing may deprive a capital defendant of potentially life-saving advantages. As we have recognized, the jury operates as an essential bulwark to "prevent oppression by the Government." *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968). "'[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system.'" *Gregg* v. *Georgia*, 428 U. S. 153, 181 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), quoting *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 n. 15 (1968). Indeed, it has been argued that juries are less inclined to sentence a defendant to death than are judges. See *Spaziano* v. *Florida*, 468 U. S. 447, 488 n. 34 (1984) (STEVENS, J., concurring in part and dissenting in part), citing H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 37–50 (1968).

Under Ohio law, the consequences of a capital defendant's waiver are particularly far-reaching. As noted, had petitioner not waived his jury trial right in favor of the three-judge panel, his life would have been spared unless all twelve jurors could have agreed that death was the proper sentence, and unless the trial judge then independently determined that the jury reached the correct result. The practical effect of petitioner's waiver, then, was to forfeit the right to have ten additional decisionmakers review his punishment—each of whom would have had the power to veto his death sentence and some of whom might well have been less likely to vote for the death sentence than the three judges on the panel.

Given the consequences of petitioner's decision, the trial court's inquiry, which focused only upon whether petitioner signed the boilerplate waiver form voluntarily, was constitutionally inadequate. The court did not determine whether petitioner fully understood his entitlement to a jury trial—that is, whether he had signed the waiver "with sufficient awareness of the relevant circumstances and likely consequences" of his act. See *Brady* v. *United States*, *supra*, at 748. Nor did the waiver itself cure this defect, since it did no more than inform petitioner of his "constitutional right to a trial by jury." 53 Ohio St. 3d, at 25, 559 N. E. 2d, at 468. It did not explain to him that he also was waiving his right to be sentenced by a jury or that, in the absence of a waiver, he could be sentenced to death only upon the jury's unanimous vote and the independent approval of the trial judge.

It is no answer to assume, as did the Ohio Supreme Court, that petitioner's "opportunity to consult with counsel," *ibid.*, was an adequate substitute for a full inquiry in open court. The Ohio Supreme Court made no effort to ascertain whether counsel had even conferred with petitioner at all, or, if they did confer, what petitioner was told. As I have noted be-

fore, courts cannot confidently assume that defense counsel have apprised a capital defendant of the considerations relevant to a decision to waive his right to a jury.

> "A presumption that defendant's counsel will always inform him of the relevant factors in a decision to waive constitutional rights amounts to a rule that all waivers made after the defendant has retained counsel *necessarily* will be considered voluntary, knowing, and intelligent. Such a rule offends common sense and impermissibly strips a defendant of constitutional protections long recognized by this Court." *Robertson* v. *California*, 493 U. S. ——, —— (1989) (MARSHALL, J., dissenting from denial of certiorari).

Such casual presumptions not only have no place in matters of life and death but also contravene "[t]he requirement that *the prosecution* spread on the record the prerequisites of a valid waiver." *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969) (emphasis added). When a defendant purports to waive a fundamental constitutional right, "it is the State that has the burden of establishing a valid waiver." *Michigan* v. *Jackson*, 475 U. S. 625, 633 (1986). Because the State clearly has not met that burden in this case, I would grant the petition for certiorari.

II

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence even if I did not believe this case otherwise merited review.